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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE,

Petitioner,

v.

CATERPILLAR, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: August 30, 2008

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QUESTIONS PRESENTED

I. Whether the Panel of the United States Court of Appeals for the First Circuit ("Appeals Court") failed to respect federal law and erred in its ruling because: (a) plaintiff Trans-Spec Truck Service, Inc. ("Trans-Spec") had no duty to anticipate in its Complaint the affirmative defenses of defendant Caterpillar Inc. ("Caterpillar"), and it eliminated Trans-Spec's right to rebut them; (b) Trans-Spec could not address a Magistrate Judge's new theory, not proffered in Caterpillar's Motion to Dismiss but articulated for the first time in the Magistrate Judge's Report and Recommendation, until the Objection phase; and, (c) it affirmed dismissal of Trans-Spec's plausible, non-speculative entitlement to relief.

II. Whether the Appeals Court failed to respect federal law and erred in its ruling by: (a) applying the wrong Fed. R. Civ. P. 16(b) standard to hold Trans-Spec's post-dismissal Motion to Amend untimely; and, (b) ignoring that Trans-Spec met this wrong standard because Trans-Spec could not have moved for leave to amend to cure any purported deficiencies raised in Caterpillar's Motion to Dismiss before the Rule 15 Scheduling Order deadline where Rule 12 and 15 Motions were due on March 23, 2005, and Caterpillar filed its Rule 12 Motion to Dismiss untimely on May 26, 2005.

III. Whether the Appeals Court erred in failing to identify a Caterpillar document as a warranty of future performance.

IV. Whether the Appeals Court failed to respect federal law and erred in its ruling by: (a) ignoring precedent as to the effect Caterpillar's repudiation of its warranty obligations had on an exclusion for liability; and, (b) sanctioning where the District Court, in granting summary judgment in Caterpillar's favor, did not draw inferences in favor of the non-moving party and did not allow for jury determination on questions where it was appropriate.

RULE 29.6 STATEMENT

Petitioner Trans-Spec, pursuant to Rule 29.6, states that it is a privately held company. There is no publicly held corporation that owns more than 10% of its stock.

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The opinion of the United States Court of Appeals for the First Circuit is reported at 524 F.3d 315 (1st Cir. April 30, 2008). (A. 3a) The Report and Recommendations of the Magistrate Judge accepted by the United States District Court for the District of Massachusetts as to Caterpillar's Motion to Dismiss is not yet reported. (A. 33a) The Order of the Magistrate Judge denying Trans-Spec's Motion to Amend is not yet reported. (A. 51a) The Report and Recommendations of the Magistrate Judge accepted by the United States District Court for the District of Massachusetts as to Caterpillar's Motion for Summary Judgment is reported at 2007 WL 776428 (D.Mass., March 15, 2007). (A. 63a)

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the First Circuit, affirming the District Court's Orders dismissing two counts of Trans-Spec's Complaint, denying Trans-Spec's Motion to Amend, and granting summary judgment in Caterpillar's favor on the third count of Trans-Spec's Complaint, was handed down on April 30, 2008. A timely petition for rehearing was denied on June 3, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 15(a)(2):

In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

Federal Rule of Civil Procedure 16(b)(4):

A schedule may be modified only for good cause and with the judge's consent.

Mass. Gen. Laws c. 106, §2-725(1) and (2):

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

STATEMENT

The claims underlying this appeal involve warranty breaches, unfair and deceptive acts and practices, and negligence by Caterpillar.

In December 1999 and January 2000, Trans-Spec took delivery of 22 custom-built heavy-duty trucks powered by Caterpillar C-12 engines. Around the time of delivery, Caterpillar gave to Trans-Spec an "On-Highway Vehicle Engine Extended Service Coverage Registration Certificate" ("the Five Year Warranty"), under which Caterpillar agreed to: (a) provide "assurance against unexpected repair costs for covered component failures due to defects in materials or workmanship under normal use"; (b) "provide[] full components and labor coverage for covered components failures due to defects in materials or workmanship under normal use"; (c) "repair" any such defects; and, (d) "pay 100% of the components and labor charges for covered failures, with no deductible charges," for five years or 500,000 miles.

Around the same time, Caterpillar also gave Trans-Spec a concurrent "Limited Warranty", under which "Caterpillar . . . warrants new . . . C12 . . . engines sold by it for use in powering on-highway vehicles . . . to be free from defects in material and workmanship" for a "*standard warranty period*" of "24 months after date of delivery[.]" The Limited Warranty additionally referred to an "Extended Warranty", under which certain "parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . .

whichever occurs first[.]"[1] No party disputes the language, authenticity, or applicability of either the Five Year Warranty document or the Limited Warranty document. Neither document contained an integration clause.

Trans-Spec alleged, and its experts confirmed, that Caterpillar's design for its flywheel housings contained significant flaws. No way existed for Trans-Spec to detect the faulty flywheel housings before they broke. Flywheel housings cannot be examined pursuant to routine maintenance, and examining them requires removing the entire

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[1] The Appeals Court offered that this language in the Limited Warranty itself comprises a five-year warranty of future performance. Opinion, A. 16a (hereafter cited Op. [page]). Trans-Spec agrees, though it thought that this language referred to the Five Year Warranty. Either way, the effect is the same: Caterpillar indisputably provided Trans-Spec with a textbook definition of a warranty of future performance under which certain parts, including the ones that failed, "are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first[.]" *See R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983)(warranty that units would perform in a specified manner for a specified period of time, with limitation of the remedy to repair or replacement, extended to future performance); *Standard Alliance Industries, Inc. v. The Black Clawson Company*, 587 F.2d. 812, 820-21 (6th Cir. 1978), *cert denied*, 441 U.S. 923 (1979)([i]f a seller expressly warrants a product for a specified number of years, it is clear that, by this action alone, he is explicitly warranting the future performance of the goods for that period of time"; where defendant warrants a machine for one year, "the warranties explicitly extended to future performance for a period of one year," and "under §2-725(2) the cause of action accrued when plaintiff discovered or should have discovered that the machine was defective, so long as the defect arose within the warranty period.") .

transmission from the truck and destroying in the process certain other parts. Additionally, cracks in the flywheel housing can be microscopic, or concealed by oil or engine grime.

The first of many flywheel housing failures Trans-Spec suffered manifested in late 2001. Other entities experienced similar failures. Caterpillar initially reimbursed, under the Warranties, for repairs related to the failures Trans-Spec suffered. In doing so, Caterpillar admitted, by the terms of the Warranties, that defects in Caterpillar materials or workmanship caused the flywheel housing failures Trans-Spec suffered, Trans-Spec operated the engines within normal parameters, and the Warranties applied to Trans-Spec's flywheel housing failures. Unfortunately, Caterpillar's solution was to mandate replacement of the defective engine parts with identically defective parts, but never actually "correct" the defects on all 22 engines (despite assurances in the Limited Warranty that it would do so where it described its responsibilities during both the Standard and Extended Warranty periods).

Inexplicably and without warning, Caterpillar refused to pay for further repairs beginning in 2003. Later deposition testimony by Caterpillar confirmed that the Caterpillar employees who stopped reimbursement for Trans-Spec's flywheel housing failures did not consult with any engineers to confirm whether defective Caterpillar materials or workmanship caused Trans-Spec's problems, nor did they consult Caterpillar's Warranty Administration Department. Trans-Spec was left holding 22 defective engines and some meaningless Warranties.

Trans-Spec had to make and pay for future failures on its own, and continue to suffer crippling levels of down time for the trucks in its fleet.

Trans-Spec tried, without success, to obtain relief from Caterpillar without litigation. Caterpillar and its agents repeatedly assured Trans-Spec that Caterpillar would make Trans-Spec whole for the damages it suffered as a result of the engine problems. When Caterpillar failed to do so, Trans-Spec filed suit against Caterpillar on August 23, 2004. Trans-Spec alleged breach of warranty (Count 1), and violation of Mass. Gen. Laws c. 93A ("Chapter 93A"), which prohibits unfair and deceptive acts and practices (Count 2).[2] Trans-Spec's Complaint referred to breaches of multiple "express warranties", among them, that the "flywheel housings . . . were to be covered for repair or replacement." Trans-Spec attached to its Complaint the Five Year Warranty document, but not the Limited Warranty document.

Under the Scheduling Order, Caterpillar's Motion to Dismiss was due by March 23, 2005. Caterpillar filed a Motion to Dismiss on May 25, 2005, without seeking leave to do so under Fed. R. Civ. P. 16(b).

Caterpillar's Motion to Dismiss conceded that the Five Year Warranty comprised an "express warranty". Accordingly, in its Opposition Trans-Spec treated the Five Year Warranty as Caterpillar

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[2] After obtaining adequate discovery, Trans-Spec successfully moved the Court to add Count 3 to its Complaint, alleging negligence against Caterpillar.

had in the Motion to Dismiss: as an "express warranty".

Caterpillar cited only M.G.L. c. 106, §2-725 and *Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co.*, 404 Mass. 103, 533 N.E.2d 1350 (1989), to argue that a statute of limitations of four years from the date of delivery applied to Trans-Spec's warranty and Chapter 93A claims. *Bay State-Spray*, however, concerned only implied warranties, not express warranties or warranties of future performance as existed here. Trans-Spec accordingly cited in its Opposition, *among other things*, the M.G.L. c. 106, §2-725(2) exception for warranties of future performance. Trans-Spec appended additional materials to its Opposition because it was rebutting Caterpillar's affirmative defense.

The District Court referred Caterpillar's Motion to Dismiss to a Magistrate Judge. On the papers, the Magistrate Judge properly should have recommended that Trans-Spec's express warranty claims were timely, that its implied warranty claims were untimely under *Bay State-Spray*, but, as Trans-Spec argued in its Opposition, the statute of limitations as to these implied warranty claims was tolled.

Instead, the Magistrate Judge *sua sponte* identified the Five Year Warranty as a "repair or replace" warranty. Caterpillar made no such argument in its Motion to Dismiss. Trans-Spec never addressed the repair or replace warranty theory in the Opposition it filed because this theory appeared for the first time in the Magistrate Judge's

Report and Recommendations. *But see* Op. A. 12a-13a (criticizing Trans-Spec for addressing the Magistrate Judge's new theory in its Objection). After failing to recognize the Five Year Warranty as a warranty of future performance, the Magistrate Judge recommended dismissing all of Trans-Spec's warranty claims, whether they involved express or implied warranties, as barred by the statute of limitations because Trans-Spec filed suit beyond four years from the date of delivery of the Caterpillar engines. The Magistrate Judge failed to recognize that Trans-Spec's Chapter 93A claim included matters other than Caterpillar's breach of warranty, and recommended dismissing it on the same statute of limitations grounds. The Magistrate Judge disregarded Trans-Spec's rebuttal materials.

Trans-Spec timely objected to the Magistrate Judge's Report and Recommendations. Trans-Spec addressed in this Objection the Magistrate Judge's new "repair or replace" theory. In light of the necessity caused by the Magistrate Judge's Report, Trans-Spec further established estoppel and tolling. Trans-Spec also sought in this Objection leave to amend its Complaint. Trans-Spec appended additional materials to support this Objection and Motion to Amend, including the Limited Warranty and deposition transcript excerpts, *but see* Op. A. 12a (criticizing that the Limited Warranty used to rebut the Magistrate Judge's new theory was not earlier presented to the Magistrate Judge). Within a day of service of Caterpillar's Reply to Trans-Spec's Objection, on February 23, 2006, the District Judge adopted the Magistrate Judge's Recommendations,

and noted that he also had disregarded Trans-Spec's additional materials.

Because the District Judge did not address the Motion to Amend in Trans-Spec's Objection, Trans-Spec on March 1, 2006, moved again to amend its Complaint to cure purported defects, append the Limited Warranty to the Complaint, and allege facts establishing estoppel and tolling of the statute of limitations. The District Court referred this Motion to Amend to the Magistrate Judge, who denied it on June 9, 2006. Trans-Spec on June 14, 2006, objected to the Magistrate Judge's Order denying its Motion to Amend. On January 2, 2007, the District Court affirmed the Order.

Separately, Caterpillar moved for summary judgment on Trans-Spec's negligence claim, relying on an exclusion contained in the text of the Limited Warranty. On December 1, 2006, the Magistrate Judge recommended granting summary judgment in Caterpillar's favor on this count. On December 11, 2006, Trans-Spec objected. On February 13, 2007, the District Court adopted the Magistrate Judge's Report and Recommendations and granted summary judgment in Caterpillar's favor on Count 3 of Trans-Spec's Complaint. Judgment entered on February 14, 2007. Trans-Spec filed its Notice of Appeal on March 5, 2007.

This Petition seeks to have the Court review the April 30, 2008, opinion of the Appeals Court, which affirmed underlying Orders of the District Court which dismissed Counts 1 and 2 of Trans-Spec's Complaint, denied Trans-Spec's Motion to Amend,

and granted summary judgment in Caterpillar's favor on Count 3 of Trans-Spec's Complaint.[3]

REASONS FOR GRANTING THE PETITION

I. **The Appeals Court erred: (a) because Trans-Spec had no duty to anticipate in its Complaint Caterpillar's affirmative defenses and it eliminated Trans-Spec's right to rebut them; (b) because Trans-Spec could not address the Magistrate Judge's new theory earlier; and, (c) by affirming dismissal of Trans-Spec's viable claims.**

Under Fed. R. Civ. P. 8(a)(2), "[s]pecific facts are not necessary" in a well-pleaded complaint, but only a short and plain statement giving fair notice of the plaintiff's claim. *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) plaintiff allowed to make more specific allegations in later filings). Dismissal predicated on the statute of limitations should be affirmed only if the pleader's allegations leave no doubt that an asserted claim is time-barred. *Young v. Lepone*, 305 F.3d 1, 8 (1st Cir. 2002); *Blackstone Realty LLC v. FDIC*, 244 F.3d 193, 197 (1st Cir. 2001).

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[3] The specific relevant District Court orders affirmed by the Appeals Court are the Magistrate Judge's January 31, 2006 Report and Recommendations, the District Court's February 23, 2006 Order adopting it, the Magistrate Judge's June 9, 2006 Order denying Trans-Spec's Motion to Amend, the District Court's January 2, 2007 Order overruling Trans-Spec's Objection to it, the Magistrate Judge's December 1, 2006 Report and Recommendations, the District Court's February 13, 2007 Order adopting it, and the District Court's February 14, 2007 Judgment.

That was not the case here. Moreover, as Trans-Spec's Objection and the materials appended to it showed, Trans-Spec proffered a plausible, non-speculative entitlement to relief, and can prove a set of facts entitling it to relief on the dismissed claims. *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955, 1965 (2007); *Rodriguez-Ortiz v. Margo Caribe, Inc.*, 490 F.3d 92, 95 (1st Cir. 2007).

Here, Trans-Spec's pleadings did not clearly establish a defense by the statute of limitations. Moreover, Trans-Spec could and did provide facts and allegations to challenge Caterpillar's affirmative defense regarding the statute of limitations, once Caterpillar asserted it in the Motion to Dismiss. Instead of following appropriate procedural law, however, the Appeals Court created new pleading and dismissal standards in the First Circuit.

Additionally, the Appeals Court held that it was not an abuse of the District Court's discretion to disregard the additional facts and allegations relied on by Trans-Spec to rebut Caterpillar's affirmative defense. Op. A. 11a-13a.[4] Trans-Spec was not under

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[4] The Appeals Court did not review the extrinsic materials Trans-Spec submitted in opposition to the Motion to Dismiss, Op.10, including the Limited Warranty, even though the Appeals Court in its discretion should have done so as part of its de novo review, Op. A. 11a, 7a; *see also Martin v. Applied Cellular Technology, Inc.* 284 F.3d 1, 5 (1st Cir. 2002) (*de novo* standard of review to granted motions to dismiss). Instead, the Appeals Court acted as if bound by the decisions of the District Court and Magistrate Judge on this point. Trans-Spec fully addressed use of extrinsic materials in reply to argument on this issue first raised by Caterpillar in its brief. The Appeals Court treated Trans-Spec's argument on that point as waived because Trans-Spec did not develop it in its opening brief. Op.

a duty to anticipate Caterpillar's affirmative defenses, which are subject to being treated as surplusage. 5 Charles A. Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1276 (3d ed. 2004) at 623-26; *see also Rosen v. Egghead.com, Inc.*, 194 F.Supp. 2d 224, 227 (S.D.N.Y 2002)("Anticipation of defenses in a complaint was not even recognized at common law and now is merely tolerated. . . . Plaintiff may always . . . rebut defendant's proof of affirmative defenses." (citations omitted)).

Under the Appeals Court's ruling, however, a plaintiff must anticipate affirmative defenses (and possible judicial errors), no matter how remote or inconceivable, when drafting a complaint. Had Trans-Spec anticipated and pled the facts and allegations to address Caterpillar's statute of limitations defense, there likely would have been no dismissal of Counts 1 and 2 of its Complaint. Not doing so, and following the usual course of litigation, led Trans-Spec to its present situation.

A. 10a-12a. Trans-Spec appealed the entirety of the District Court's Order on the Motion to Dismiss, along with multiple other Magistrate Judge Reports and District Court Orders. Trans-Spec did not discuss the District Court's error on this point because it was immaterial to the Appeals Court's de novo review. Moreover, the District Court's exclusion of extrinsic materials constituted plain and obvious error. After Caterpillar raised the issue in its Brief, Trans-Spec provided a thorough reply. Separately, extrinsic materials were properly before the District Court on both Motions to Amend, and these materials should have informed the analysis of the District Court and the Appeals Court on both Motions to Amend. The Appeals Court did not acknowledge that fact.

Forcing such expansive pleading is not the purpose of motions to dismiss, and it directly violates Federal procedural law. "Rule 8(c) is designed to provide plaintiffs with adequate notice of a defendant's intention to litigate an affirmative defense, thereby affording an opportunity to develop any evidence and offer responsive arguments relating to the defense." *Davignon v. Clemmey*, 322 F.3d 1, 15 (1st Cir. 2003); *see also General Electric Capital Corporation v. Posey*, 415 F.3d 391, 398-99 (5th Cir. 2005) (unless dismissal pursuant to an affirmative defense is based on facts that are incontrovertible on the face of the Complaint, discovery should go forward and matter should be resolved by summary judgment or trial; dismissal reversed); *Harris v. City of New York*, 186 F.3d 243, 251 (2nd Cir. 1999) (plaintiff "need not include such allegations" in complaint as are necessary to defeat a statute of limitations defense because "the statute of limitations is an affirmative defense under Rule 8(c) that [Trans-Spec's] pleading need not have anticipated[.]" (citations omitted); *Tregenza v. Great American Communications Co.*, 12 F.3d 717, 718 (7th Cir. 1993) ("The statute of limitations is an affirmative defense, and a plaintiff is not required to negate an affirmative defense in his complaint.").

Thus, the Appeals Court contradicted the appropriate standard when it affirmed dismissal because Trans-Spec did not anticipate Caterpillar's affirmative defense and did not plead facts in its Complaint to defeat it. Instead, the Appeals Court set forth a different pleading requirement from that required by the Federal Rules of Civil Procedure. Now, at least in the First Circuit, a litigant must

anticipate potential affirmative defenses or face dismissal, as Trans-Spec experienced, if the District Court below chooses to disregard materials and information submitted to rebut an affirmative defense.

Separately, Trans-Spec did not address the "repair or replace" theory earlier because it was raised for the first time by the Magistrate Judge. Even in moving to dismiss Trans-Spec's warranty claims as barred by the statute of limitations, Caterpillar conceded that the Five Year Warranty comprised an "express warranty". Caterpillar's Motion to Dismiss described the Five Year Warranty in those words, and Trans-Spec opposed the Motion to Dismiss accordingly.[5] Once the Magistrate Judge on her own held the Five Year Warranty to be a "repair or replace" warranty, Trans-Spec objected, appended additional materials to the Objection, which included a determinative document not in dispute, and articulated tolling and estoppel arguments. Trans-Spec also sought leave to amend its Complaint so as to incorporate some of the

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[5] A September 9, 2004, affidavit of Caterpillar's Manager of Technical Support stated the "extended warranty on each engine ends either on December 8, 2004 (for the engines delivered on December 9, 1999) or January 14, 2005 (for the engines delivered on January 15, 2000)." On January 28, 2005, Caterpillar answered an interrogatory, "Caterpillar's express warranties provided, in part, that if a defect in material or workmanship is found during the extended (5-year or 5000,000 miles) warranty period . . . Caterpillar will . . . correct the defect." Neither document was attached to Trans-Spec's Complaint because Caterpillar submitted them in the course of litigation. Both documents are nonetheless relevant because they confirm Caterpillar's own understanding that it had given Trans-Spec a five year warranty of future performance.

additional non-disputed materials, e.g., Caterpillar's own Limited Warranty document, and plead its estoppel and tolling arguments. The District Court erred to deny Trans-Spec's Motion to Amend its Complaint, and the Appeals Court erroneously affirmed.

In departing from *Davignon* and the cases from the Second, Fifth, and Seventh Circuit cited above, the Appeals Court in this case creates confusion, lack of uniformity among the circuits, and a new standard of pleading in the First Circuit. Now, in the First Circuit, a defendant can successfully move to dismiss under Fed. R. Civ. P. 12(b)(6) pursuant to an affirmative defense not anticipated, and thus not rebutted, by the plaintiff in its Complaint.

Moreover, under the Appeals Court's ruling, the District Court is free in its discretion to ignore any materials the non-moving plaintiff appends in opposition to an affirmative defense, as well as any rebuttal argument it proffers, that did not appear in its original Complaint.

"[T]here are times when a court should take into account documents beyond the complaint in evaluating whether a Fed. R. Civ. P. 12 motion should be granted[.]" *Coyne v. Cronin*, 386 F.3d 280, 286 (1st Cir. 2004). In *Coyne*, the Court held that the District Court erred not to consider an affidavit submitted to it on a motion for reconsideration not even connected to the motion to dismiss, noting that, "to hold that the affidavit must be disregarded . . . would waste time and resources without reason." *Id.*; *see also Beddall v. State Street Bank and Trust Co.*,

137 F.3d 12, 16-17 (1st Cir. 1998) (requiring "a practical commonsense approach" "that does not elevate form over substance" in deciding motions to dismiss because "the court's inquiry into the viability of those allegations should not be hamstrung simply because the plaintiff fails to append to the complaint the very document upon which by her own admission the allegations rest. . . . We doubt that the drafters of the Civil Rules, who envisioned Rule 12(b)(6) motions as a swift, uncomplicated way to weed out plainly unmeritorious cases, would have countenanced such a result.").

Besides, restriction against the Court's general ability to look outside of the pleadings when analyzing a Rule 12(b) motion exists as a procedural safeguard to protect plaintiffs. *Watterson v. Page*, 987 F.2d 1, 4 (1st Cir. 1993). In analyzing motions to dismiss, "courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties . . . for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* at 3. Here, Trans-Spec met all three criteria as to the Limited Warranty: the document is undisputed, it is central to Trans-Spec's claim, and Trans-Spec's Complaint referred to multiple "express warranties" in Paragraph 38 and multiple "warranties" in Paragraph 39. Moreover, greater lenience is afforded where, as here, "[Trans-Spec] . . . introduced the documents [itself], in order to bolster [its] argument against the defendants' motions to dismiss." *Id.* The *Watterson* Court thus "treat[ed] the documents submitted by plaintiffs – [including, *inter alia*, an affidavit and a written report] – as part

of the pleadings." *Id.* Even the Appeals Court in this case noted that a document on which a plaintiff's claim is dependant, the authenticity of which is not challenged, "effectively merges into the pleadings," Op. A. 10a.

Nonetheless, while the Appeals Court relied on the Limited Warranty to affirm the dismissal of Trans-Spec's negligence claim on summary judgment, Op. A. 23a-30a, it ignored the Limited Warranty's impact on preserving Trans-Spec's warranty claims. In a striking double standard, under the Appeals Court's ruling, Trans-Spec cannot use a document on which Caterpillar relies.

The Appeal Court's ruling conflicts with the above-cited cases, including those from the First Circuit and other circuits, and creates uncertainty in Federal procedural law. The Supreme Court must act to correct the Appeals Court's error in sanctioning grave departures from the accepted and usual course of judicial proceedings, and to maintain national uniformity as to procedural law.

II. **The Appeals Court erred to: (a) apply the Fed. R. Civ. P. 16(b) standard to hold untimely Trans-Spec's post-dismissal Motion to Amend; and, (b) disregard that Trans-Spec met this standard because Caterpillar's late filing of its Motion to Dismiss made it impossible for Trans-Spec to move for leave to amend to cure any purported deficiencies raised by that Motion prior to the deadline to do so.**

Granting either of Trans-Spec's Motions to Amend would have allowed it to cure all purported deficiencies and obtain "just, speedy" resolution of its claims against Caterpillar by jury trial. *See* Fed. R. Civ. P. 1. That is why motions to dismiss are routinely followed by motions to amend, which in turn are routinely granted so long as the amendment is not futile. Among others, the Supreme Court, and the Appeals Courts in the Second, Fifth, and Ninth Circuits do not apply Fed. R. Civ. P. 16(b) to motions to amend following dismissal. These jurisdictions do not examine whether the information sought to be added to the Complaint could have been added prior to dismissal, nor do they address the timing of the dismissal. The guiding principle is solely whether the plaintiff can cure defects to set forth a viable complaint.

The Appeals Court here created a new, but illogical, standard in the First Circuit by affirming denial of Trans-Spec's Motion to Amend, filed responsive to Caterpillar's own late-filed Motion to Dismiss, as untimely under the "good cause" standard in Fed. R. Civ. P. 16(b).

First off, the Supreme Court and other jurisdictions mandate that after dismissal, "amendment to correct a deficiency in pleading should be 'freely given when justice so requires[.]' Where the amended complaint would state a valid cause of action, a motion to amend should normally be granted." *Gaffney v. Silk*, 488 F.2d 1248, 1251 (1st Cir. 1973) (citations omitted); *see also Foman v. Davis*, 371 U.S. 178 (1962); *Coyne v. City of Somerville*, 972 F.2d 440, 446 (1st Cir. 1992) (adopting the Fed. R. Civ. P. 15(a) standard post-dismissal that "[l]eave to amend 'shall be freely given when justice so requires," though denying leave there because plaintiff sought to make futile changes); *Giannetta v. Boucher*, 1992 U.S. App. Lexis 33313, *24-25 (1st Cir. 1992) (applying Rule 15(a) to an untimely filed motion to amend to add a new party). These cases apply the Rule 15(a) standard where a plaintiff moves to amend after the Court grants a motion to dismiss.

The Appeals Court here conflicts with these cases by affirming the District Court's application of the Rule 16(b) "good cause" standard instead where Trans-Spec's Motion to Amend was filed responsive to a Motion to Dismiss. *Compare* post-dismissal grants of leave to amend in *Buckey v. County of Los Angeles*, 968 F.2d 791, 794-95 (9th Cir. 1992); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48-50 (2nd Cir. 1991) ("abuse of discretion to deny leave" where claim not futile); *Oliver Sch. v. Foley*, 930 F.2d 248, 252-53 (2nd Cir. 1991); *Lone Star Motor Import, Inc. v. Citroen Cars Corporation*, 288 F.2d 69, 75-77 (5th Cir. 1961) ("prejudice, perhaps

irreparable, if leave is not granted" to establish allegations which make the complaint sufficient).

In *Foman v. Davis*, 371 U.S. 178 (1962), the appellant obtained post-dismissal leave to amend a complaint. *Id.* at 179. Examining a similar situation, the First Circuit Court of Appeals held that where the proposed amended complaint sufficiently stated a cause of action, "the district court abused its discretion in failing to grant plaintiffs' motion to amend." *Gaffney*, 488 F.2d at 1250; *see also Gomez v. Toledo*, 602 F.2d 1018, 1021 (1st Cir. 1979). "When a claim is dismissed under Rule 12(b)(6), courts customarily allow leave to amend" because "[i]f a plaintiff has 'at least colorable grounds for relief, justice does . . . require leave to amend.'" *Williams v. Astra USA, Inc.*, 68 F. Supp. 2d 29, 33 (D. Mass. 1999) (citations omitted) (emphasis added). The Appeals Court here ignored the bright-line rule wherein leave to amend is nearly automatic following the granting of a motion to dismiss, so long as the motion to amend complies with traditional Rule 15(a) analysis.[6]

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[6] Not one of nine cases Caterpillar cited to the Appeals Court to oppose this proposition involved a situation where the plaintiff sought leave to amend so as to cure dismissal of the complaint based on one of the defendant's affirmative defenses. In fact, all of the cases Caterpillar cited dealt with garden variety motions to amend, e.g., to add new claims or additional defendants, brought after expiration of the Rule 16 scheduling order deadline but not in the context of a dismissal (*O'Connell v. Hyatt Hotels of Puerto Rico*, 357 F.3d 152 (1st Cir. 2004) did involve a case where a Court *denied* a motion to dismiss). *But see Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 n. 11 (4th Cir. 1999) ("the federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities

Second, under the scheduling order, Caterpillar's Motion to Dismiss was due by March 23, 2005; so was any Motion to Amend. Caterpillar filed the Motion to Dismiss over two months late, on May 26, 2005. The docket indicates no resetting of the Rule 12 deadline, nor did Caterpillar seek leave to file untimely. Because Caterpillar's own Motion to Dismiss was untimely, no way existed for Trans-Spec to file its responsive Motion to Amend prior to expiration of the amendment deadline. Trans-Spec necessarily had to file past the amendment deadline to cure any purported defects raised in the Motion to Dismiss because Caterpillar filed it untimely.

"Good cause" under Rule 16(b) requires a plaintiff to demonstrate it could not reasonably have met the deadline despite diligent efforts to do so. How could Trans-Spec have filed a Motion to Amend to cure purported deficiencies raised in Caterpillar's Motion to Dismiss *before* Caterpillar served the Motion to Dismiss? If this is not "good cause," what is?

Trans-Spec immediately opposed Caterpillar's untimely filing without success. No Court applied Rule 16(b) to Caterpillar's untimely Motion to Dismiss. Yet, in another striking double standard, the District Court applied Rule 16(b) so as to deny Trans-Spec's Motion to Amend, and the Appeals Court affirmed. Op. A. 21a-23a (also inaccurately stating that none of the information sought to be added was relevant to Trans-Spec's estoppel theory or future performance warranty theory, *but see*, among other things, the text of the Limited

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requires that a plaintiff be given every opportunity to cure a formal defect in his pleading.").

Warranty which comprises a textbook warranty of future performance).

The Appeals Court clearly acted outside of the usual and accepted course of judicial proceedings to apply the Rule 16(b) good cause standard to one party's motion but not the other party's motion. In the process, the Appeals Court set a counterintuitive precedent at odds with Federal procedural law. Now, in the First Circuit, a plaintiff cannot bring a motion to amend following a motion to dismiss filed on or beyond the last day for filing such motions under a Scheduling Order. Under the Appeal Court's holding, such a motion to amend is barred as violating the Scheduling Order.

Moreover, even if a Rule 16(b) standard applies, Trans-Spec met that standard as well as the stricter "manifest injustice" standard of Rule 16(e). Trans-Spec did not unduly delay in seeking to amend its Complaint; Trans-Spec did so in a timely filed Objection to the Magistrate Judge's Report and Recommendations. No need to amend the Complaint existed prior to that, and Trans-Spec could not have anticipated the Magistrate Judge's new theory until she issued her Report, *but see* Op. A. 22a (criticizing Trans-Spec for filing the Motion to Amend eleven months after the deadline to do so, but neglecting that this comprised the delay generated by Caterpillar's untimely filing as well as the length of time before the Magistrate Judge issued her Report) The Appeals Court's ruling errs to affirm a scenario wherein Trans-Spec never had an opportunity to rebut Caterpillar's affirmative defense or cure the matter by amending its Complaint. In so doing, the

Appeals Court ruling affirmed dismissal of Trans-Spec's claims, which are viable even if based only on the Caterpillar admissions, testimony, and documents appended to Trans-Spec's Objection and Motion to Amend.

III. The Appeals Court erred because the Five Year Warranty comes under the future performance exception in Mass. Gen. Laws c. 106, §2-725(2).

Caterpillar identified the Five Year Warranty as an "express warranty" in its Motion to Dismiss and elsewhere (*see* footnote 5 above). Caterpillar's position on this point changed after the Magistrate Judge issued her Report and Recommendations. As Trans-Spec has accordingly argued from the start, the Five Year Warranty falls under the future performance exception for express warranties.

The Uniform Commercial Code ("U.C.C."), as adopted in Massachusetts, provides that an action for breach of warranty must be commenced within four years of the date when the cause of action accrues. Mass. Gen. Laws c. 106, §2-725(1). The Massachusetts statute then specifies, in §2-725(2), when the cause of action accrues:

> A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the

> goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered. (emphasis added)

The Appeals Court's ruling, however, conflicts with M.G.L. c. 106, §2-725(2) because it subjects claims arising from the type of warranty of future performance Caterpillar gave Trans-Spec to a statute of repose-like bar four years from the date of delivery, regardless of the warranty's duration on its face.

The Appeals Court noted that the Supreme Judicial Court of Massachusetts has not ruled on the proper application here of the future performance requirement in §2-725(2) of the U.C.C. While the Appeals Court could have certified questions of law to the Supreme Judicial Court of Massachusetts for determination under that Court's Uniform Certification of Questions of Law Rule (Supreme Judicial Court Rule 1:03), it opted not to do so.[7]

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[7] Supreme Judicial Court Rule 1:03 reads, in relevant part:

> This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other State when requested by the certifying court if there are involved in any proceeding before it questions of law of this State which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying

Instead, it sought to make "an informed prophecy of what the court would do in the same situation," looking to "analogous cases decided by other courts in the forum state, persuasive reasoning in cases from other states, and learned treatises." Op. A. 14a-15a (citation omitted). The Appeals Court then came up with a counterintuitive result contrary to the one Massachusetts case it cited, and which negates the validity of Caterpillar's Five Year Warranty once four years has passed from the date of delivery of its engines.[8]

The Appeals Court's ruling contradicts persuasive opinions cited to it from various State Courts, including *Nationwide Ins. Co. v. General Motors Corp.*, 533 Pa. 423, 429-34; 625 A.2d 1172, 1175-78 (1991) (overturning summary judgment granted on statute of limitations grounds to hold that a 12

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court there is no controlling precedent in the decisions of this court.

[8] Trans-Spec did not claim breach of contract, Op. A. 18a-19a, because Caterpillar gave Trans-Spec the Five Year Warranty, subsequently identified as a "repair or replace" warranty by the Magistrate Judge, without charge. What seemed to Trans-Spec at the time to be good customer relations practice by Caterpillar actually allows Caterpillar to claim lack of consideration for the Five Year Warranty if it is construed as a "repair or replace" contract. If the Five Year Warranty is construed as a contract, Caterpillar thus reserved the right to walk away from its obligations under it at any time. That is precisely what Caterpillar did here. Caterpillar gulled Trans-Spec into thinking it was getting warranty protection on its Caterpillar engines for five years, but then benefits from the Court's treatment of the Five Year Warranty as a service contract, which Caterpillar rendered unenforceable as such for lack of consideration. Trans-Spec has claimed breach for failure to repair from the start, *but see* Op. A. 17a-18a, fn. 7.

month/12,000 mile "Limited Warranty" promising "repairs and needed adjustments to correct defects in materials or workmanship" is a warranty of future performance under §2-725; defendant "disingenuously" made a distinction without difference in claiming that the "Limited Warranty" was a "repair warranty"), and *Krieger v. Nick Alexander Imports, Inc.*, 234 Cal.App. 3d 205, 217 ("promise to repair defects that occur during a future period is the very definition of express warranty of future performance"). These cases, directly on point, should have been considered in the "informed prophecy" of the Appeals Court, in the absence of seeking guidance by the Massachusetts Supreme Judicial Court.[9]

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[9] The Appeals Court's ruling also ignored the persuasive analysis cited to it and offered by the Rhode Island Superior Court in 2007 when it compared *Krieger* with the case on which the Magistrate Judge relied, *Ontario Hydro v. Zallea Systems, Inc.*, 569 F. Supp. 1261 (D.Del 1983). The Rhode Island Superior Court determined that the *Krieger* case was "better-reasoned" and more likely to be adopted by the Rhode Island Supreme Court. *Asea Brown Boveri, S.A. v. Alcoa Fujikura Ltd.*, 2007 R.I. Super. LEXIS 59, *19-21 (Additionally holding, "It simply makes no sense to say that a warranty to repair or replace defective goods within five years is not a warranty of future performance. . . . [B]y making a promise to repair or replace within a certain time period--in this case five years--the seller is acknowledging the possibility that a defect in the goods may remain latent for a period of time and agrees to bear that risk. No manufacturer can say with absolute certainty that their product will perform adequately in the future--all it can ever do is bear the cost of repair or replacement if it does fail. Therefore, to distinguish between a warranty of future performance and an agreement to repair or replace would render the latter type of clause virtually meaningless. Such a holding would deprive the Plaintiffs of the benefit of their bargain, which placed the burden on the seller to supply a product free from defects for five years. . . . Moreover, as long as

Thus, regardless of the issues raised in Sections I and II above, Trans-Spec's claims under the Five Year Warranty should have been permitted to proceed (and, as noted in the Statement above, Trans-Spec's Complaint encompassed other claims, including as to other express warranties). Instead, the Appeals Court's analysis directly "lead[s] to a situation where a consumer who purchases a vehicle with a 7 year/70,000 mile warranty would have no cause of action for breach of that warranty if the breach were to occur in the fifth year following the date of delivery." *Nationwide*, 533 Pa. at 430, 625 A.2d at 1176 (calling this "absurd", including in the context of a "repair or replace" warranty). Here, Trans-Spec brought suit in August 2004, while the Five Year Warranty was still valid by its terms (it expired December 2004 for some trucks, January 2005 for others), within three years after the first flywheel housing failure manifested itself (late 2001), and approximately a year after Caterpillar decided to stop honoring its warranty obligations (mid-2003). Nonetheless, the Appeals Court affirmed dismissal of Trans-Spec's claims as untimely under the statute of limitations, under the theory that no warranties of future performance were at issue.

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a certain time period is stated, such clauses provides the requisite explicitness required by § 2-725."). The Appeals Court's ruling conflicts with several Circuit and District Court cases cited to it by Trans-Spec, such as *Grand Island Express v. Timpte Indus., Inc.*, 28 F.3d 73, 75 (8th Cir. 1994); *R. W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 823 (8th Cir. 1983); *Standard Alliance*, 587 F.2d 812, 820-21 (6th Cir. 1978); *Coady v. Marvin Lumber & Cedar Co.*, 167 F. Supp. 2d 166, 170 (D. Mass. 2001).

The Appeals Court disregarded First Circuit recognition that a "'promise to repair warranty' refers to a type of warranty that stipulates the remedy to be invoked if the product purchased becomes faulty," and, "[i]f the promisor does not abide by the promise to repair, then the promisee has a cause of action for the underlying breach of warranty for the defective product." *Neuhoff v. Marvin Lumber and Cedar Company*, 370 F.3d 197, 201 (1st Cir. 2004) (citing *Standard Alliance*, 587 F.2d at 818 n.10). That statement describes exactly what happened here.

The Appeals Court misapplied, at Op. A. 18a, *New England Power Company v. Riley Stoker Corporation*, 20 Mass. App. Ct. 25, 30; 477 N.E.2d 1054, 1058 (1985)("promises to repair or to replace are generally viewed as specifications of a remedy rather than as an independent or separate warranty," but "when there are a warranty and a promise to repair, the remedy of first resort is the promise to repair. If that promise is not fulfilled, then the cause of action is the underlying breach of warranty."). *New England Power* thus holds that even if Caterpillar had limited Trans-Spec's remedy, Trans-Spec had the right to bring an action for breach of the underlying warranty when Caterpillar failed to fulfill the remedy. Moreover, *New England Power* involved a settlement agreement whereby alterations would be made to a boiler in exchange for release of withheld payments. Like *Bay State-Spray*, *New England Power* barred only non-warranty claims and claims as to implied warranties, not express warranties or warranties of future performance.

Here, Caterpillar reneged on any promise to repair, yet the Appeals Court nonetheless cut off any further recourse for Trans-Spec. To the extent there is any ambiguity or confusion in the Five Year Warranty, that ambiguity should be construed against its drafter, Caterpillar.

Moreover, the Appeals Court turned a blind eye to the effect of the Limited Warranty document, which undisputedly comprised by definition a warranty of future performance. The Appeals Court affirmed application of the Limited Warranty to benefit Caterpillar: the District Court used the Limited Warranty to dismiss Trans-Spec's negligence claims against Caterpillar. At the same time, the Appeals Court affirmed the District Court's refusal to give effect to the same undisputed document where it provided warranties of future performance to Trans-Spec.

Separately, the Five Year Warranty provided "assurance against unexpected repair costs for covered component failures due to defects in materials or workmanship under normal use," language which creates a warranty in its own right. Caterpillar refused to reimburse for any further repairs in mid-2003. The Five Year Warranty on its face did not expire until December 2004 for some engines, and January 2005 for others. Trans-Spec brought suit August 2004. Nonetheless, the Appeals Court ignored this language in the Five Year Warranty.

IV. **The Appeals Court erred in affirming summary judgment in Caterpillar's favor on Trans-Spec's negligence claim because it: (a) ignored precedent as to the effect Caterpillar's repudiation of its warranty obligations had on an exclusion for liability; and, (b) sanctioned where the District Court did not draw inferences in favor of the non-moving party and did not allow for jury determination on questions where it was appropriate.**

The First Circuit has held that exclusions for liability are generally enforceable between commercial parties but also recognizes, "Massachusetts law provides . . . that the damages limitation provision is not enforceable if [Caterpillar] either willfully repudiated or was willfully dilatory in performing its warranty obligations." *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 768 (1996). Whether that happened here was a matter for jury determination, not summary judgment where factual disputes must be determined in favor of the non-moving party. *Cadle Company v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997); *Rogers v. Fair*, 902 F.2d 140, 143 (1st Cir. 1990); *Greenburg v. Puerto Rico Maritime Shipping Auth.*, 835 F.2d 932, 936 (1st Cir. 1987).

A substantial portion of Caterpillar's fact-sensitive argument on summary judgment argued for inferences as to lack of credibility by Trans-Spec. Assertions as to credibility are not a basis for summary judgment. Trans-Spec has a right to jury determination of, among other things, material facts in dispute, whether Caterpillar's Warranties failed

of their essential purpose, and whether Caterpillar waived exclusions and made misrepresentations. The Appeals Court ignored the above cases and factual issues to enforce an exclusion in the Limited Warranty (which Trans-Spec was not allowed to use in preserving its breach of warranty and Chapter 93A claims).

Additionally, the Appeals Court erred to restrict the parameters of Trans-Spec's negligence claim to its notice pleading, so as to exclude a claim for negligent repair, Op. A. 29a, *but see* Fed. R. Civ. P. 8(a)(2), *Erickson*, 127 S.Ct. at 2200, and other facts alleged in Trans-Spec's Complaint and incorporated into its negligence claim.

Furthermore, the Appeals Court denied Trans-Spec jury determination of the scope of Caterpillar's repeated assurances that it would "make [Trans-Spec] whole." Op. A. 30a. Two employees of Caterpillar's agent and local distributor, as well as two senior managers at Caterpillar, told Trans-Spec that Caterpillar would make it "whole" for the damage it suffered as a result of the defective C-12 engines. The Appeals Court claims that these Caterpillar assurances are too vague to validate Trans-Spec's oral waiver theory. Neither the Limited Warranty or the Five Year Warranty contained any integration clause which prevents Trans-Spec from introducing evidence of oral representations to the jury. *Cummings v. HPG Int'l, Inc.*, 244 F.3d 16, 21 n. 2 (1st Cir. 2001); *Town & Country Fine Jewelry Group v. Hirsch*, 875 F.Supp. 871, 876-77 (D.Mass. 1994). Determination about the meaning of Caterpillar's assurances should not

be made on summary judgment, but by a jury. In ruling as it did, the Appeals Court failed to follow the summary judgment standard.

CONCLUSION

For the above foregoing reasons, Petitioner Trans-Spec Truck Service, Inc. respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the First Circuit

No. 07-1476

TRANS-SPEC TRUCK SERVICE, INC.,
d/b/a Truck Service

Plaintiff - Appellant

v.

CATERPILLAR INC.

Defendant - Appellee

Before

Boudin, Chief Judge,
Torruella, Lynch*, Lipez and Howard,
Circuit Judges.

ORDER OF COURT

Entered: June 3, 2008

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* Judge Lynch is recused and did not participate in the consideration of this matter.

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

[cc: John A.K. Grunert, Nancy Reimer, Kevin G. Kenneally, Christian G. Samito, Richard P. Campbell]

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 07-1476

TRANS-SPEC TRUCK SERVICE, INC.,
d/b/a TRUCK SERVICE,

Plaintiff, Appellant,

v.

CATERPILLAR INC.,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Reginald C. Lindsay, U.S. District Judge]

Before

Torruella, Lipez, and Howard,
Circuit Judges.

Christian G. Samito, with whom Nancy M. Reimer and Donovan Hatem LLP were on brief, for plaintiff-appellant.

John A. K. Grunert, with whom Campbell Campbell Edwards & Conroy, P.C. was on brief, for defendant-appellee.

April 30, 2008

LIPEZ, Circuit Judge. This case requires us to apply the accrual and statute of limitations provisions of the Uniform Commercial Code of Massachusetts to breach of warranty claims brought by Trans-Spec Truck Service ("Trans-Spec") against Caterpillar, Inc. Trans-Spec purchased twenty-two heavy-duty, custom-built trucks powered by Caterpillar engines. More than four and a half years after it took delivery of the trucks, Trans-Spec filed suit against Caterpillar, alleging breach of warranty, violation of Massachusetts's unfair trade practices act, Mass. Gen. Laws ch. 93A, and negligence, arising from failures in the flywheel housings in a significant number of the Caterpillar-powered trucks. Accepting the recommendation of the magistrate judge, the district court dismissed Trans-Spec's warranty and chapter 93A claims as time-barred. Caterpillar then won summary judgment on the remaining negligence count. We affirm.

I.

We draw on the summary judgment record for the relevant background. In March 1999, Trans-Spec and Sterling Truck Corporation[1] prepared a "specification proposal" for twenty-two heavy-duty, custom-built trucks that Trans-Spec intended to purchase from Sterling for use in Trans-Spec's oil delivery and dump trailer operations. The proposal called for installation of Caterpillar's C-12 model engines in each of the trucks. Trans-Spec allegedly decided upon Caterpillar engines after extensive conversations with Caterpillar's employees and agents regarding engine specifications and performance, the terms of the warranty, and which engine manufacturer would "stand behind their warranty the best." As a non-party witness testified at a deposition, Caterpillar representatives "bragged that engine up like there was no tomorrow." After finalizing the agreement, Caterpillar shipped completely assembled engines to Sterling for installation in the trucks. In December 1999 and January 2000, Trans-Spec took delivery of the trucks and put them into service.

By late 2001, serious problems had begun to develop with the flywheel housing on the Caterpillar engines in several of Trans-Spec's trucks. The housings loosened and cracked, leading to disruptions in the use of the trucks and time-consuming repair efforts. Caterpillar reimbursed Trans-Spec for the cost of the repairs to the first six trucks that experienced these flywheel housing failures in 2001 and 2002. When a seventh truck became inoperable, Caterpillar refused to pay for additional repairs. Since that time, Trans-Spec avers that an average of six, and as

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[1] Sterling Truck Corporation is not a party to this suit.

many as ten, of the twenty-two trucks have been inoperable at any given time due to engine-related issues. Because Trans-Spec's business requires all of its trucks to operate six days a week, it has incurred operating losses as a result of the failure of the trucks. Trans-Spec made in-house repairs on the trucks, requiring it to hire additional mechanics, and in some instances performed the same repair procedure multiple times on the same truck engine. Trans-Spec alleges that these engine problems have resulted in trucks leaking oil in violation of environmental laws. Trans-Spec also alleges that the failures have lowered the resale value of the trucks and prevented Trans-Spec from trading them in for newer vehicles as it normally would.

Trans-Spec claims that the flywheel housing failures were caused by a major design defect in the C-12 engine, and that Caterpillar knew or should have known of this defect. Trans-Spec contends that the housing failures fell under the Caterpillar warranty and that Caterpillar should have rectified the problems. Trans-Spec also avers that, at meetings in June and August 2004, Caterpillar acknowledged responsibility for the flywheel housing failures and promised to "make [Trans-Spec] whole." In August 2004, apparently unpersuaded by this promise, Trans-Spec filed this suit against Caterpillar.

Trans-Spec's initial complaint alleged breach of warranty (Count I) and violations of Massachusetts General Laws chapter 93A (Count II). Its second amended complaint added a negligence claim (Count III) as well. Caterpillar moved to dismiss the second amended complaint on the grounds that Counts I and II were timebarred and that Count III was barred by the economic loss doctrine. The magistrate

judge recommended that the district court grant the motion to dismiss as to Counts I and II and deny the motion on Count III. The district court accepted these recommendations over Trans-Spec's objections. Trans-Spec's motion to further amend its second amended complaint or alter the court's dismissal order was subsequently denied as well. Caterpillar then moved for summary judgment on the remaining negligence claim on the basis of a negligence disclaimer included in one of the Caterpillar warranty documents. The magistrate judge recommended that the motion be granted and the district court agreed. The instant appeal ensued, with Trans-Spec arguing error on each of the adverse rulings below.

II.

We begin with the district court's determination that Counts I and II of Trans-Spec's complaint are time-barred. We review the grant of a motion to dismiss de novo, accepting as true the factual allegations of the complaint and drawing all reasonable inferences in favor of the plaintiff. Garita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B., 958 F.2d 15, 17 (1st Cir. 1992). We affirm the dismissal if the complaint fails to state facts sufficient to establish a "claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007). Affirmative defenses, such as the statute of limitations, may be raised in a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), provided that "the facts establishing the defense [are] clear 'on the face of the plaintiff's pleadings.'"

Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001) (quoting Aldahonda-Rivera v. Parke Davis & Co., 882 F.2d 590, 591 (1st Cir. 1989)). Where the dates included in the complaint show that the limitations period has been exceeded and the complaint fails to "sketch a factual predicate" that would warrant the application of either a different statute of limitations period or equitable estoppel, dismissal is appropriate. See LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 509-10 (1st Cir. 1998); Blackstone Realty, 244 F.3d at 197.

A. Scope of the Record Subject to Review

Before proceeding to our substantive analysis of the applicability of the statute of limitations to Counts I and II of Trans-Spec's complaint, we must first clarify the scope of the record subject to our review. The controlling pleading is Trans-Spec's second amended complaint. Appended to this complaint is a document titled "On-Highway Vehicle Engine Extended Service Coverage" (hereinafter "ESC"), which Trans-Spec refers to in the complaint[2] and in its opposition to Caterpillar's motion to dismiss as "the Caterpillar warranty" that forms the basis of its claims. Neither party disputes that the appended ESC was incorporated into the complaint and properly considered at the motion to dismiss stage.

However, Trans-Spec seeks to rely on several additional documents to defeat the motion to dismiss. First, Trans-Spec appended documents to its opposition to Caterpillar's motion to dismiss, including excerpts of deposition testimony and affidavits that

[2] Subsequent references to "the complaint" refer to Trans-Spec's second amended complaint unless otherwise indicated.

Trans-Spec wished to use to establish that Caterpillar should be equitably estopped from asserting the statute of limitations. After the magistrate judge recommended that Caterpillar's motion to dismiss be granted without considering the additional documents submitted by Trans-Spec, Trans-Spec's objection to the magistrate judge's report and recommendation also included as an exhibit a copy of another document, titled "Caterpillar Limited Warranty." Trans-Spec referred to this document as the "two-year warranty," and asserted, for the first time in its objection to the magistrate judge's report, that this document formed the basis for an additional warranty claim that would not be barred by the statute of limitations. Caterpillar promptly asked the district court to strike all of the additional documents submitted by Trans-Spec. The district court deemed this motion moot because both the district court and the magistrate judge had explicitly disregarded the appended documents as outside the pleadings, and hence inapplicable to a Rule 12(b)(6) determination.

Under Rule 12(b)(6), the district court may properly consider only facts and documents that are part of or incorporated into the complaint; if matters outside the pleadings are considered, the motion must be decided under the more stringent standards applicable to a Rule 56 motion for summary judgment. Garita Hotel, 958 F.2d at 18. Exhibits attached to the complaint are properly considered part of the pleading "for all purposes," including Rule 12(b)(6). Fed. R. Civ. P. 10(c); Blackstone Realty, 244 F.3d at 195 n.1. Additionally, we have noted that "[w]hen . . . a complaint's factual allegations are expressly linked to – and admittedly dependent upon – a document (the authenticity of which is not challenged), that

document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." Beddall v. State St. Bank & Trust Co., 137 F.3d 12, 16-17 (1st Cir. 1998); see also Clorox Co. P. R. v. Proctor & Gamble Comm. Co., 228 F.3d 24, 32 (1st Cir. 2000) (holding that, in ruling on a Rule 12(b)(6) motion, a district court "'may properly consider the relevant entirety of a document integral to or explicitly relied upon in the complaint, even though not attached to the complaint'" (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1120 (1st Cir. 1996))).

At the discretion of the district court, a motion to dismiss may be converted to a motion for summary judgment if the court chooses to consider materials outside the pleadings in making its ruling. Fed. R. Civ. P. 12(d); Garita Hotel, 958 F.2d at 18. However, if the district court chooses, as it did here, to ignore supplementary materials submitted with the motion papers and determine the motion under the Rule 12(b)(6) standard, no conversion occurs and the supplementary materials do not become part of the record for purposes of the Rule 12(b)(6) motion. Garita Hotel, 958 F.2d at 18-19. We review a motion to dismiss using the "same criteria that obtained in the court below." Id. at 17. As a result, we review only those documents actually considered by the district court in its Rule 12(b)(6) analysis unless we are persuaded that the court below erred in declining to consider the proffered documents. See Coyne v. Cronin, 386 F.3d 280, 286 (1st Cir. 2004).

Trans-Spec does not argue in its opening brief that the district court abused its discretion by refusing to convert the motion to dismiss to a motion for summary judgment nor that it erred by choosing to

disregard the documents appended to Trans-Spec's opposition to the motion to dismiss or included as an exhibit to Trans-Spec's objection to the magistrate judge's report and recommendation. Instead, Trans-Spec's opening brief marshals these documents in support of its argument as if they had been part of the record considered by the court below in deciding the Rule 12(b)(6) motion. Thus, rather than assigning error to the decision of the district court to disregard the supplemental documents, Trans-Spec's opening brief ignores that decision and, by doing so, misrepresents the state of the record. Caterpillar forcefully argued this misrepresentation in its responsive brief. Then, in Trans-Spec's reply brief and at oral argument, Trans-Spec finally argued that the district court erred in refusing to consider these supplemental documents in its review and it argued that we should consider them in our review. That argument came too late. See Pignons S.A. de Mecanique v. Polaroid Corp., 701 F.2d 1, 3 (1st Cir. 1983) ("In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed, and appellant generally may not preserve a claim merely by referring to it in a reply brief or at oral argument."). Accordingly, in our review of the motion to dismiss, we will consider, as the district court did, only the facts and inferences fairly gleaned from the text of Trans-Spec's second amended complaint and the ESC appended thereto.

We pause further only to emphasize that, even if Trans-Spec had not waived its argument on appeal, it was well within the discretion of the district court to refuse to consider the "Caterpillar Limited Warranty" document, i.e. the so-called "two-year warran-

ty." Trans-Spec's complaint refers generically to "the Caterpillar warranty," but then directs the court only to the ESC, which was attached as an exhibit. If Trans-Spec also wished to base its allegations on the "Caterpillar Limited Warranty," Trans-Spec should have also referred the court to it specifically and attached it to the complaint. Then, the magistrate judge would almost certainly have treated the additional warranty as integral to the complaint, and she would have considered it. But Trans-Spec did not submit that document to the magistrate judge. Although Trans-Spec was aware of the "Caterpillar Limited Warranty" from the outset of the case, Trans-Spec decided to omit it from the magistrate judge's review.[3]

The district court is permitted, at its discretion, to consider materials not before the magistrate judge. 28 U.S.C. § 636(b)(1). However, that discretion must be exercised sparingly. We have previously noted that it would be "fundamentally unfair to permit a litigant to set its case in motion before the magistrate, wait to see which way the wind was blowing, and - having received an unfavorable recommendation – shift gears before the district judge." Paterson-Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 991 (1st Cir. 1988). Moreover, "[s]ystemic efficiencies would be frustrated and the magistrate's

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[3] Caterpillar's counsel suggested at oral argument that Trans-Spec's efforts to base its claims solely on the ESC are a result of its desire to avoid the consequences of a negligence disclaimer contained in the "Caterpillar Limited Warranty" document. Whatever the rationale, the result is the same. The "Caterpillar Limited Warranty" document was never presented to the magistrate judge, was not considered by the district court, and is not properly before us on appeal from the grant of the motion to dismiss.

role reduced to that of a mere dress rehearser if a party were allowed to feint and weave at the initial hearing, and save its knockout punch for the second round." Id. Accordingly, it was well within the district court's discretion to decline to consider the "Caterpillar Limited Warranty" document in deciding the motion to dismiss.

Thus, in our review of the motion to dismiss, we are limited to the text of Trans-Spec's complaint and the language in the ESC. We will not review the deposition testimony, affidavits, or additional warranty documents that were not considered by the magistrate judge and the district court.

B. Future Performance

The Uniform Commercial Code ("U.C.C."), as adopted in Massachusetts, provides that an action for breach of warranty must be commenced within four years of the date when the cause of action accrues.[4] Mass. Gen. Laws ch. 106, § 2-725(1). The code section then specifies when the cause of action accrues:

> A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

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[4] The parties agree that Massachusetts law applies to this dispute.

Id. § 2-725(2). Thus, the default rule in § 2-725(2) is that the cause of action for breach of warranty is time-barred if brought more than four years after tender of delivery. However, if the warranty explicitly extends to future performance, "the four-year clock begins to tick when the breach is discovered or should have been discovered, or when the explicit time period expires, whichever occurs first." Barkley Clark & Christopher Smith, The Law of Product Warranties § 11:4 (2006).

Trans-Spec's complaint stated that Trans-Spec accepted delivery of the trucks containing Caterpillar's allegedly defective flywheel housing in December 1999 and January 2000. Trans-Spec filed suit for breach of warranty in August 2004. Thus, on its face, Trans-Spec's complaint is not timely unless the warranty on which its claims are based is one that "explicitly extend[s] to future performance of the goods" and the circumstances are such that the "'discovery of the breach must await'" the time of the promised future performance.[5] See Coady v. Marvin Lumber & Cedar Co., 167 F. Supp. 2d 166, 170 (D. Mass. 2001) (quoting Raytheon Co. v. Helix Tech. Corp., 1999 WL 753483, *3 (Mass. Super. 1999)).

The Supreme Judicial Court of Massachusetts has not discussed the proper application of the future performance requirement in § 2-725(2) of the U.C.C. Thus we must make "an informed prophecy of what the court would do in the same situation." Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1151 (1st Cir. 1996). In making such a prophecy, we look to ana-

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[5] Because we determine that the warranty language does not explicitly extend to the future performance of the goods, we do not reach the question of whether discovery of the defect "must await" the time of future performance.

logous cases decided by other courts in the forum state, persuasive reasoning in cases from other states, and learned treatises. Id.

To determine whether a warranty is one of future performance, we must look to the language of the warranty itself to determine whether it explicitly guarantees the future performance of the goods. See Coady, 167 F. Supp. 2d at 170 ("In determining whether a warranty explicitly extends to future performance, courts have emphasized the word 'explicitly' . . . ."). For example, if a warranty states that the product "would be free from defects in materials and workmanship for a period of five years," it explicitly extends to the future performance of the goods. See, e.g., Grand Island Exp. v. Timpte Indus., Inc., 28 F.3d 73, 75 (8th Cir. 1994); Std. Alliance Indus., Inc. v. Black Clawson Co., 587 F.2d 813, 820-21 (6th Cir. 1978); see also Clark & Smith, supra, § 11:4. If, on the other hand, the warranty states "we promise to repair the product if it malfunctions within the first five years," it does not explicitly guarantee the future performance of the goods. Clark & Smith, supra, § 11:4; cf. New Eng. Power Co. v. Riley Stoker Corp., 477 N.E.2d 1054, 1058-59 (Mass. App. Ct. 1985). This type of repair promise warrants the future performance of the warrantor, not the goods. Clark & Smith, supra, § 11:4. The warrantor has not guaranteed that the goods will not malfunction in the future, but rather that the warrantor will remedy any problems that arise in a particular way for a limited period of time. Id.; see, e.g., Neb. Popcorn, Inc. v. Wing, 602 N.W.2d 18, 23 (Neb. 1999) ("A warranty to repair or replace does not guarantee proper performance. Rather, it anticipates potential defects and specifies the buyer's remedy during the stated

period."); Flagg Energy Dev. Corp. v. General Motors Corp., 709 A.2d 1075, 1086 (Conn. 1998) (repair or replacement clause provides buyer only the relief expressly promised and is not a promise of future performance of the goods); Tittle v. Steel City Oldsmobile GMC Truck, Inc., 544 So.2d 883, 889-91 (Ala. 1989) (repair or replace language does not guarantee that goods will perform free of defects; rather it anticipates that defects will occur).

The only warranty language properly before us in considering Caterpillar's motion to dismiss is contained in the "On-Highway Vehicle Engine Extended Service Coverage" ("ESC") document, which was appended to Trans-Spec's complaint. The ESC states: "This service contract . . . provides full components and labor coverage for covered components failures due to defects in Caterpillar materials or workmanship under normal use."[6] The ESC guarantees that "Caterpillar will pay 100% of the components and labor charges for covered failures, with no deductible

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[6] The ESC also states that "it runs concurrently with the Caterpillar On-Highway Vehicle Engine Warranty." This sentence almost certainly refers to the "Limited Warranty" document. Although Trans-Spec refers to this document as the "two-year warranty," it actually contains language that could reasonably be construed as a five-year warranty of future performance on certain parts, including the flywheel housings: "These parts are warranted against defects in material and workmanship for 60 months or 500,000 miles or 10,000 operating hours, whichever occurs first after date of delivery to the first user." Trans-Spec perhaps could have argued that this language was incorporated by reference as a result of this sentence in the ESC referring to the "Limited Warranty" document and was, as a result, integral to the complaint. However, Trans-Spec did not make such an argument and does not even point out the cross-reference in its appellate brief. Consequently, we will not consider it.

charges" for failures occurring within the first 60 months or 500,000 miles. It specifies Caterpillar's responsibility to "restore the engine to its operating condition prior to failure by repairing/replacing only the defective components and consequential damaged components necessary to remove/repair/install the defective components."

The ESC thus never guaranteed that Caterpillar's engines would not fail; it merely warranted that Caterpillar would pay to repair them if they did fail. As such, the warranty provided in the ESC is not a warranty that explicitly extends to the future performance of the goods, and the later accrual date specified in § 2-725(2) does not apply. Thus, Trans-Spec's claims are timebarred by the four-year statute of limitations that began to run on the date of delivery of the trucks.

In reaching this conclusion, we note that some courts have interpreted a vehicle manufacturer's promise to repair or replace defective parts as capable of being breached, not at tender of delivery, but only in the event that the promised repairs are refused or unsuccessful. See, e.g., Mydlach v. DaimlerChrysler Corp., 875 N.E.2d 1047, 1059-60 (Ill. 2007) (holding that a promise to repair is not an "express warranty" and thus accrual for breach of a repair promise is not governed by § 2-725(2), which applies only to breach of warranty). These courts have held that the cause of action for breach of a repair promise accrues when the promisor fails to or refuses to repair the defects. Id. However, this view does not prevail in Massachusetts.[7] In New England

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[7] Moreover, Trans-Spec argues that the repair promise contained in the ESC constitutes a "remedy of first resort" for breach of an express warranty of future performance. Trans-

Power, the Appeals Court of Massachusetts rejected the position that a promise to repair or replace should be viewed as an independent or separate warranty. 477 N.E.2d at 1058. Instead, the court said that such promises "are generally viewed as specifications of a remedy" and that if the promise to repair "is not fulfilled, then the cause of action is the underlying breach of warranty." Id. The court describes as "a fallacy" the argument that "by failing to remedy its first breach, the defendant committed a second breach, giving rise to a brand new cause of action and starting anew the limitations period." Id. Thus, the court held that the promise to repair had no effect on the statute of limitations for the breach of warranty. See id. at 1058-59.

The ESC appears to be framed as a separate "service contract," rather than a limitation of remedy on a warranty, and could perhaps be treated as such. However, Trans-Spec styled its complaint as a claim for breach of warranty under the U.C.C., not for breach of a service contract.[8] As such, Trans-Spec's claim is subject to analysis under § 2-725(2), the U.C.C.'s statutory provision regarding the accrual of a claim for breach of warranty. Because Trans-Spec does not allege or even argue that the ESC is a separate service contract, rather than a U.C.C. express warranty, we will not treat it as such for the purpos-

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Spec does not argue that the repair promise is separately enforceable. Thus, the argument has been waived.

[8] Service contracts, because they are not primarily concerned with the sale of goods, would fall outside the purview of the U.C.C.'s statutory scheme and would be governed by the general sixyear statute of limitations and the common law contract principle that the cause of action accrues at the time the promise is breached. See Mass. Gen. Laws ch. 106, § 2-102 ("[T]his Article applies to transactions in goods . . . .").

es of our analysis. Cf. Cosman v. Ford Motor Co., 674 N.E.2d 61, 68 (Ill. App. Ct. 1996) (dismissing a count framed in U.C.C. terms, but sustaining claim for breach of a promise to repair brought under the Magnuson-Moss Act because such a claim "cannot ripen until the promise is broken and has nothing to do with the inherent quality of the goods or their future performance").[9] As a result, any breach of which Trans-Spec is complaining must stem from an underlying U.C.C. warranty on the engines themselves. Trans-Spec has not identified, within the record properly before us, any underlying warranty guaranteeing the future performance of the goods themselves. The claim for breach therefore accrued on the date of delivery of the goods and Trans-Spec's suit, which was filed more than four years after delivery of the trucks, is time-barred.

C. Equitable Estoppel

If Trans-Spec is to escape the consequence of its lack of diligence in bringing this action, it must do so by averring that Caterpillar lulled Trans-Spec into the delay. See New Eng. Power, 477 N.E.2d at 1059. Where it appears from the dates and facts recounted in the complaint that the statute of limitations has run, the plaintiff has an affirmative burden to plead in its complaint the facts required to establish estoppel. LaChapelle, 142 F.3d at 509-10. Under Massachusetts law, "estoppel would require proof that the

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[9] Trans-Spec's complaint also alleges breach of the Magnuson-Moss Act. See 15 U.S.C. § 2304(a). However, that federal provision only applies to consumer goods. The Caterpillar engines in Trans-Spec's trucks are not consumer goods, and the claim was therefore dismissed below.

defendants made representations they knew or should have known would induce the plaintiffs to put off bringing a suit and that the plaintiffs did in fact delay in reliance on the representations." White v. Peabody Const. Co., 434 N.E.2d 1015, 1023 (Mass. 1982). "[H]onest, genuine repair efforts, standing alone," are not a "sufficient basis for application of the doctrine of estoppel." New Eng. Power, 477 N.E.2d at 1060. Trans-Spec's complaint does not allege any representations made by Caterpillar that induced Trans-Spec to delay filing suit, nor does the complaint allege that Caterpillar's efforts to repair the trucks were insincere or pretextual. Instead, the complaint alleges only that they were unsuccessful.[10] See id. Having failed to allege any facts predicate to the estoppel claim in its complaint, Trans-Spec premises its claim on the deposition transcripts and affidavits attached to its opposition to Caterpillar's motion to dismiss and its objection to the magistrate judge's report and recommendation. As we noted above, Trans-Spec waived its argument that the magistrate judge and the district judge should have considered these documents, either by deeming them integral to Trans-Spec's complaint or by converting

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[10] Indeed, Trans-Spec seems to allege that at some point between 2002 and 2004 Caterpillar refused to pay for additional repairs. This allegation seriously diminishes Trans-Spec's argument that Caterpillar made representations that lulled it into delay in filing suit. On the contrary, Caterpillar's actions appear to have put Trans-Spec on notice that Caterpillar was disputing its liability for the failures and that Trans-Spec may have to file suit in order to force Caterpillar to pay. The only representations by Caterpillar officials that are recounted in the complaint occurred in June and August 2004. By that date the four-year statute of limitations had already run. Obviously, no estoppel claim can arise from representations made by Caterpillar after the time for filing suit had already passed.

Caterpillar's motion to dismiss into a motion for summary judgment. Thus, the documents are not properly before us and we will not consider them. As a result, Trans-Spec's estoppel argument fails.[11]

D. Count II – Chapter 93A Claim

Count II of Trans-Spec's complaint alleges that, by breaching its warranty obligations to Trans-Spec, Caterpillar engaged in unfair trade practices in violation of Massachusetts General Laws chapter 93A. The accrual date of the chapter 93A claim is the same as the accrual date for the underlying action. Hanson Housing Auth. v. Dryvit Sys., Inc., 560 N.E.2d 1290, 1295 (Mass. App. Ct. 1990). Accordingly, the four-year statute of limitations applicable to chapter 93A actions, Mass. Gen. Laws ch. 260, § 5A, had expired when Trans-Spec filed suit in August 2004.

III.

Following the magistrate judge's recommendation that Caterpillar's motion to dismiss be granted, Trans-Spec filed a motion to amend the pleadings, which the magistrate judge denied. We review the denial of a motion to amend the pleadings under an abuse of discretion standard. O'Connell v. Hyatt Hotels, 357 F.3d 152, 154 (1st Cir. 2004).

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[11] To the extent that Trans-Spec's argument is premised on fraudulent concealment sufficient to warrant statutory tolling under Massachusetts General Laws chapter 260, § 12, it fails for the same reason: Trans-Spec's complaint failed to allege any fraudulent concealment by Caterpillar.

Trans-Spec argues that the magistrate judge erred by failing to apply the "liberal" amendment policy set forth in Federal Rule of Civil Procedure 15(a), which provides that pleadings may be amended with court approval and that "[t]he court should freely give leave when justice so requires." See Fed. R. Civ. P. 15(a)(2). However, as the magistrate judge correctly noted, Rule 16(b) establishes a different standard when a motion to amend comes late in the case. Rule 16(b) requires that the district court enter a scheduling order setting the deadlines for subsequent proceedings in the litigation, including amendment of the pleadings. Fed. R. Civ. P. 16(b)(1), (3)(A). One purpose of the rule is "to assure 'that at some point . . . the pleadings will be fixed.'" O'Connell, 357 F.3d at 154 (quoting Adv. Comm. Notes to 1983 Amends. to Fed. R. Civ. P. 16(b)). The deadlines established in the scheduling order may be extended on a showing of good cause. Id. Our case law clearly establishes that Rule 16(b)'s "good cause" standard, rather than Rule 15(a)'s "freely give[n]" standard, governs motions to amend filed after scheduling order deadlines. Id. at 154-55.

Here, Trans-Spec filed its motion to amend eleven months after the deadline established by the scheduling order. Although Trans-Spec seeks to justify its delay by pointing to information discovered at various depositions, none of that information is relevant to the estoppel theory or the future performance warranty theory that could allow Trans-Spec's claims to survive the motion to dismiss. The allegations that Trans-Spec seeks to add to its amended complaint are based on information that Trans-Spec had or should have had from the outset

of the case.[12] The explanation for the delay seems to be simply that Trans-Spec thought that it would prevail on the motion to dismiss without any need to further amend. In that, its calculations were wrong. Nonetheless, Trans-Spec must be bound by the consequences of its litigation strategy. See James v. Watt, 716 F.2d 71, 77 (1st Cir. 1983) ("[T]he pleadings in this case were drawn as part of a litigating strategy and plaintiffs showed the district court no reason why they should not be bound by the consequences of that strategy."). Accordingly, Trans-Spec's motion to amend was properly denied.[13]

IV.

Next, we turn to Trans-Spec's challenge to the district court's grant of Caterpillar's summary judgment motion with regard to Count III, Trans-Spec's negligence claim. We review a grant of summary

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[12] On the issue of estoppel, any evidence of reliance by Trans-Spec officials on Caterpillar's representations that it would "make Trans-Spec whole" would not require discovery. Any such evidence of reliance would be within the knowledge of Trans-Spec's own officials. With regard to the so-called "two-year warranty," Trans-Spec does not explain when it discovered the existence of this warranty. As this warranty formed part of the basis for the bargain for the sale of the trucks, Trans-Spec was or should have been aware of its existence prior to the filing of its initial complaint.

[13] Trans-Spec's motion to amend its complaint also contained a motion to alter or amend the court's order dismissing Trans-Spec's breach of warranty claims "to correct clear legal error and to prevent manifest injustice." As we have explained above, we find no legal error in the district court's granting of Caterpillar's motion to dismiss. As a result, the district court did not err in denying Trans-Spec's motion to alter or amend the order.

judgment de novo. Palmieri v. Nynex Long Distance Co., 437 F.3d 111, 113 (1st Cir. 2006). "In conducting such review, we examine the summary judgment record in the light most friendly to the summary judgment loser, and we indulge all reasonable inferences in that party's favor." Nat'l Amusements v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). We affirm the grant of summary judgment if we conclude that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002). The moving party has the initial burden of demonstrating the absence of an issue of material fact necessitating a trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). If the moving party successfully carries this burden, the party opposing the motion must present affirmative evidence "sufficient to deflect brevis disposition." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991). In meeting these burdens, "[n]either party may rely on conclusory allegations or unsubstantiated denials, but must identify specific facts derived from the pleadings, depositions, answers to interrogatories, admissions and affidavits to demonstrate either the existence or absence of an issue of fact." Magee v. United States, 121 F.3d 1, 3 (1st Cir. 1997). At the summary judgment stage, our review is no longer limited to the parties' pleadings. Thus, although the "Caterpillar Limited Warranty" (the so-called "two-year warranty") was not part of the record for the purposes of the motion to dismiss, it was properly before the magistrate judge when she considered Caterpillar's subsequent motion for summary judgment on the remaining claims, and it

is properly part of the record we now review. The "Caterpillar Limited Warranty," which both parties agree was part of the contract governing Trans-Spec's acquisition of truck engines from Caterpillar, contained the following language in bold-faced, capital letters:

> CATERPILLAR EXCLUDES ALL LIABILITY FOR OR ARISING FROM ANY NEGLIGENCE ON ITS PART OR ON THE PART OF ANY OF ITS EMPLOYEES, AGENTS, OR REPRESENTATIVES IN RESPECT OF THE MANUFACTURE OR SUPPLY OF GOODS OR THE PROVISION OF SERVICES RELATING TO THE GOODS.

Caterpillar argues that this language effectively bars Trans-Spec's claim of negligence against Caterpillar for the design, development, assembly, manufacture, inspection, testing, marketing, advertising, and distribution of the truck engines. We agree.

It is well established that "under the law of Massachusetts in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf." Sharon v. City of Newton, 769 N.E.2d 738, 744 (Mass. 2002) (internal quotation marks and ellipses omitted). Exculpatory clauses[14] permit parties to make "sensible business

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[14] An "exculpatory clause" is "[a] contractual provision relieving a party from liability resulting from a negligent or wrongful act." Black's Law Dictionary 608 (8th ed. 2004).

judgments" allocating risk. Minassian v. Ogden Suffolk Downs, Inc., 509 N.E.2d 1190, 1192 (Mass. 1987). As a result, Massachusetts courts typically enforce such clauses according to their terms, particularly in a business context. Id.; see also Deerskin Trading Post, Inc. v. Spencer Press, Inc., 495 N.E.2d 303, 307 (Mass. 1986) ("Limiting damages . . . where the two parties are sophisticated business entities, and where consequential damages . . . could be extensive, is a reasonable business practice . . . .").

Exculpatory clauses are rendered void if they are unconscionable. See Mass. Gen. Laws ch. 106, § 2-302(1) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result."). Under Massachusetts law, "unconscionability must be determined on a case by case basis, giving particular attention to whether, at the time of the execution of the agreement, the contract provision could result in unfair surprise and was oppressive to the allegedly disadvantaged party." Zapatha v. Dairy Mart, Inc., 408 N.E.2d 1370, 1376 (Mass. 1980) (citation omitted). The inquiry into unfair surprise is "focused on the circumstances under which the agreement was entered into." Id. The question of oppression is, in turn, "directed to the substantive fairness to the parties of permitting the [exculpatory] provisions to operate as written." Id. at 1377. Thus, this two-part inquiry "involves a search for components of 'procedural' and 'substantive' unconscionability." Id. at 1377 n.13.

The clause excluding liability for negligence in this case does not have the components of either procedural or substantive unconscionability. Neither opaquely worded nor hidden in small print, the exculpatory clause would not support a finding of unfair surprise. Moreover, both Caterpillar and Trans-Spec are sophisticated commercial parties who negotiated the contract for the sale of the truck engines at arm's length.

Trans-Spec argues that the clause is unconscionable because Caterpillar "affirmatively misrepresented the capabilities and reliability of its [engines] and failed to disclose its negligent design and manufacture," depriving Trans-Spec of any meaningful choice in negotiating the contract. In support of its contention that Caterpillar "affirmatively misrepresented" the engines, Trans-Spec cites the deposition testimony of a non-party witness who reported that Caterpillar "bragg[ed] that engine up like there was no tomorrow." This testimony recounts classic seller's talk, which is not actionable as a misrepresentation. Moran v. Levin, 64 N.E.2d 360, 362 (Mass. 1945). Trans-Spec also cites a Caterpillar-owned patent for an improved flywheel housing, U.S. Patent No. 6,065,757 (filed July 2, 1998), as evidence that Caterpillar failed to disclose the "negligent design and manufacture" of the engines sold to Trans-Spec, which included an earlier flywheel housing design. However, as the district court aptly explained, "Caterpillar's effort to improve on a piece of equipment can not be viewed as evidence that unimproved equipment was negligently designed or manufactured." See Fed. R. Evid. 407. Accordingly, Trans-Spec's contention that the exculpatory clause is unconscionable as a result of either misrepresentation

or concealment of negligent design fails because it is unsupported by evidence in the record.

Next, Trans-Spec argues that enforcing the exculpatory clause to foreclose a negligence claim would be unconscionable because it would leave Trans-Spec without "a fair quantum of remedy." Mass. Gen. Laws ch. 106, § 2-719 cmt. 1. We disagree. If Trans-Spec finds itself without an adequate remedy here, it is because, as we describe above, Trans-Spec did not assert its contract remedies in a timely fashion. Trans-Spec may not be rewarded for this delay through the revival of tort remedies that were explicitly excluded by agreement.

Trans-Spec also argues that because the warranty remedies failed of their essential purpose, the negligence exclusion clause is invalid. In support of this argument, Trans-Spec cites Massachusetts General Laws chapter 106, § 2-719(2), which provides that "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter." Even assuming that the warranty remedies failed of their essential purpose in this case, the cited language does not result in the invalidity of the negligence disclaimer. The chapter referred to by the language of § 2-719(2) contains the Uniform Commercial Code, which sets forth contractual remedies, see, e.g., Mass. Gen. Laws ch. 160, § 2-715 (defining incidental and consequential damages for breach of contract), not tort remedies. Accordingly, even if the warranty remedies did fail of their essential purpose, the effect of this failure would be to revive other contractual remedies, if they had not been time-barred.[15] Such a

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[15] The four-year statute of limitations in § 2-725(1) applies to all claims brought under the U.C.C., not just to warranty

revival would have no effect on the exclusion of tort liability by means of a negligence disclaimer. See Tokio Marine & Fire Ins. Co. v. McDonnell Douglas Corp., 617 F.2d 936, 941 (2nd Cir. 1980) (holding that U.C.C. § 2-719(2) could not be used to "construct a remedy in tort" where the plaintiff's cause of action for breach of warranty was barred by the statute of limitations).

Trans-Spec further argues that the ESC contains no exclusion of liability for negligence and thus Trans-Spec may be held liable for its failure to perform repairs in a workmanlike manner. Although Trans-Spec's complaint alleges a litany of negligent conduct by Caterpillar ("negligent design, development, assembly, manufacture, inspection, testing, marketing, advertising, and distribution"), the complaint does not allege negligent repair. Accordingly, we see no need to consider this argument further.[16]

Finally, Trans-Spec asserts that the negligence exclusion clause was orally waived by Caterpillar. As record evidence of this waiver, Trans-Spec cites testimony that Caterpillar's agents and employees promised to "make [Trans-Spec] whole." Under Massachusetts law, to prove waiver of a contractual provision, a party must cite "clear, decisive and unequi-

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claims. As such, all of Trans-Spec's potential contractual claims are time-barred.

[16] Similarly, Trans-Spec argues that it has a viable claim for negligent misrepresentation and that the "district court should have inferred Trans-Spec's negligent misrepresentation claim from its negligence claim and denied Caterpillar's Motion for Summary Judgment." Trans-Spec had ample opportunity to amend its pleadings; indeed, the negligence claim itself was not in Trans-Spec's original complaint. Thus, we fail to understand why the district court would be required to infer a claim that Trans-Spec failed to assert in its pleadings.

vocal conduct . . . indicating that [the other party] would not insist on adherence" to that provision. See D. Federico Co., Inc. v. Commonwealth, 415 N.E.2d 855, 858 (Mass. App. Ct. 1981) (quoting Glynn v. City of Gloucester, 401 N.E.2d 886, 892 (Mass. App. Ct. 1980)). The vague promise made by Caterpillar does not implicate any specific contractual provision either directly or indirectly. As a result, it falls short of the standard necessary to establish waiver. In short, Trans-Spec makes no compelling argument and cites no specific facts that would invalidate the negligence exclusion clause. Thus, we conclude that the district court correctly granted Caterpillar's motion for summary judgment as to Count III of Trans-Spec's complaint.

Affirmed.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

TRANS-SPEC TRUCK SERVICE, INC.
Plaintiff(s)

v. CIVIL ACTION NO. 04-11833-RCL

CATERPILLAR, INC.
Defendant(s)

JUDGMENT IN A CIVIL CASE

LINDSAY, D.J.

☐ Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X Decision by the Court. In accordance with the Court's order dated February 13, 2007 adopting the Report and Recommendation on Caterpillar Inc.'s Motion for Summary Judgment on all Remaining Claims dated December 1, 2006;

IT IS ORDERED AND ADJUDGED

Judgment for the defendant Caterpillar Inc.

Sarah A. Thornton, Clerk

Dated: February 14, 2007 /s/ Lisa M. Hourihan
(By) Deputy Clerk

NOTE: The post judgment interest rate effective this date is _____%.

(judgciv.frm - 10/96) [jgm.]

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 04-CV-11836-RCL

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE

Plaintiff

v.

CATERPILLAR INC.

Defendant

REPORT AND RECOMMENDATION ON

CATERPILLAR INC.'S MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING CLAIMS
(*Docket #102*)

ALEXANDER, M.J.

On January 31, 2006 this Court issued a Report and Recommendation to District Court Judge Reginald C. Lindsay recommending that the Court dismiss two of the three counts in plaintiff Trans-Spec Truck Service, Inc.'s ("Trans-Spec") Second Amended Complaint against defendant Caterpillar Inc. ("Ca-

terpillar"). On February 23, 2006, Judge Lindsay adopted this Court's Report and Recommendation, dismissing Trans-Spec's claims for breaches of warranties of merchantability and fitness and express warranties (Count D and violation of Mass. Gen. Laws ch. 93A (Count II). Caterpillar now moves for summary judgment dismissing Count III of Trans-Spec's Second Amended Complaint for negligence in the design, development, assembly, manufacture, inspection, testing, marketing, advertising, and distribution of the C-12 engines purchased by Trans-Spec. Caterpillar asserts that Trans-Spec is contractually barred from raising a negligence claim and, separately, that the relief requested is barred by the economic loss doctrine. Further, Caterpillar maintains that punitive damages are not cognizable in Massachusetts under the instant scenario. After a hearing on the motion and careful consideration of the parties' asseverations, both oral and written, and for the reasons set forth more fully below, this Court RECOMMENDS that the District Court ALLOW Caterpillar's motion for summary judgment.

RELEVANT BACKGROUND

In March 1999, Trans-Spec and Sterling Truck Corporation ("Sterling") prepared a "specification proposal" for twenty-two heavy-duty, custom-built trucks that Trans-Spec anticipated purchasing from Sterling and using for its oil delivery service and dump trailer operations.[17] The proposal called for the installation of C-12 model engines, manufactured by Caterpillar, in each of the trucks. After finalizing the deal, Caterpillar shipped completely as-

[17] Sterling is not a party to this lawsuit.

sembled C-12 engines to Sterling, who installed the engines in the trucks. Trans-Spec accepted delivery of the trucks in December 1999 and January 2000.

Caterpillar provided a standard limited warranty for the engines containing the following language in bold-faced, capital letters:

> CATERPILLAR EXCLUDES ALL LIABILITY FOR OR ARISING FROM ANY NEGLIGENCE ON ITS PART OR ON THE PART OF ANY OF ITS EMPLOYEES, AGENTS, OR REPRESENTATIVES IN RESPECT OF THE MANUFACTURE OR SUPPLY OF GOODS OR THE PROVISION OF SERVICES RELATING TO THE GOODS.[18]

By 2001, serious problems began to occur with the C-12 engines. More specifically, the flywheel housings began to loosen from the engines, leading to disruptions in the use of the trucks. Although Caterpillar reimbursed Trans-Spec for repairs to six trucks that experienced flywheel housing failure in 2001 and 2002, when a seventh truck became inoperable due to engine difficulties Caterpillar refused to pay for additional repairs. Furthermore, according to Trans-Spec, Caterpillar failed to take appropriate remedial steps to address these engine problems once Caterpillar became aware of them. The engine problems also resulted in several of the trucks leak-

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[18] Two different warranties were issued — one for the engines received in December 1999 and another for the engines received in January 2000, but the relevant language of the two warranties is identical.

ing oil, sometimes while a truck was at a job site, in violation of environmental laws.

Since the engine problems began, an average of six Trans-Spec trucks have been inoperable at any given time because of engine-related issues. At times, up to ten trucks were out of service at once. Trans-Spec's business requires that it operate all of its trucks six days a week and trucks such as the ones that Trans-Spec uses cannot be rented for temporary use.

Trans-Spec also performed its own in-house repairs on the flywheel housings of sixteen trucks. In some instances, the flywheel housing had to be repaired multiple times on the same trucks. Although Trans-Spec conducted its own repairs, it avers that, pursuant to Caterpillar's warranty, Caterpillar actually should have been performing the repairs. Additionally, although the industry standard, according to Trans-Spec, is to have one mechanic per twenty-two trucks, Trans-Spec was forced to employ three additional mechanics to combat the constant breakdowns. In January 2004, Sterling agreed, upon Caterpillar's demand, to supply transmission mounts for installation in the trucks in an effort to help remedy the problems. The transmission mounts proved to be of no effect.

In June 2004, Caterpillar informed Trans-Spec that it would repair the engine breakdowns. In August 2004, Caterpillar re-iterated that it needed to address the problems and that the problems were not Trans-Spec's fault. That same month, Trans-Spec initiated the extant suit.

ANALYSIS

Summary Judgment Standard

The parameters in which this Court considers a motion for summary judgment are well-defined and familiar. Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "A dispute is genuine if the evidence about the fact is such that a reasonable jury could resolve the point in favor of the non-moving party. A fact is material if it carries with it the potential to affect the outcome of the suit under the applicable law." Sanchez v. Alvarado, 101 F.3d 223, 227 (1st Cir. 1996) (internal citations and quotations omitted). The party moving for summary judgment bears responsibility for showing those portions of the discovery record that demonstrate an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

After the moving party has fulfilled this obligation, the burden shifts to the non-moving party to demonstrate that a trier of fact reasonably could find in its favor. DeNovellis v. Shalala, 124 F.3d 298,306 (1st Cir. 1997) (citing Celotex, 477 U.S. at 322-25); Ismert & Assoc., Inc. v. New England Mut. Life Ins. Co., 801 F.2d 536, 537 (1st Cir. 1986) (describing the non-moving party's burden as one of demonstrating that there is a need for further exploration of the facts). A party opposing a motion for summary judgment may not rest on mere allegations or denials, but rather, must show that specific facts illustrate a genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

In reviewing a motion for summary judgment and the materials offered to support the motion, the role of the Court is not to engage in an analysis of whose evidence is more compelling or credible. Cetronics Fin. Corp. v. El Conquistador Hotel Corp., 573 F.2d 779, 782 (2d Cir. 1978); Peckarsky v. Am. Broad. Co., Inc., 603 F. Supp. 688, 692 (D.D.C. 1984). "[A]t the summary judgment stage, the judge's function is not himself to weigh the evidence." Anderson, 477 U.S. at 249. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.., ruling on a motion for summary judgment. ..." Id. at 255. See also Davis v. Dawson, Inc., 15 Supp. 2d 64, 71-72 (D. Mass. 1998); Barretto-Rivera v. Medina-Vargas, 168 F.3d 42, 47 (1st Cir. 1999) ("speculation adverse to the nonmoving party is inappropriate on a motion for summary judgment"); Rogers v. Fair, 902 F.2d 140, 143 (1st Cir. 1990) (in reviewing motions for summary judgment, "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). With these parameters in mind, this Court turns to the parties' assertions.

Count III - Trans-Spec's Negligence Claim

Count III of Trans-Spec's Second Amended Complaint alleges negligence on the part of Caterpillar for the design, development, assembly, manufacture, inspection, testing, marketing, advertising, and distribution of the C-12 engines purchased by Trans-Spec. Caterpillar defends that Trans-Spec's negligence claim is barred in its entirety because the parties contractually excluded all liability in negligence.

In addition, Caterpillar cites to the economic loss doctrine and the unavailability of punitive damages in the instant action as grounds for its motion for summary judgment.[19] Trans-Spec, of course, disagrees and contends that the exclusion of liability is void because the accompanying two year warranty failed of its essential purpose and that the economic loss doctrine is inapplicable.[20]

Enforceability of the Exclusion of Liability Provision

Mass. Gen. Laws ch. 106, § 2-719 is central to Trans-Spec's position regarding the exclusion of liability. Section 2-719 governs "Contractual Modification or Limitation of Remedy" and states in pertinent part that:

> (1)(a) [an] agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article....
>
> ...
>
> (2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this chapter.

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[19] This Court reaches its conclusion based on contract theory and, thus, need not and does not reach the merits of either the economic loss doctrine or punitive damages issues.

[20] Trans-Spec did not provide argument with regard to the availability of punitive damages.

> (3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable....

The independent relationship between § 2-719(2) and § 2-719(3) bears directly on Trans-Spec's claim.

"There can be no doubt that under the law of Massachusetts in the absence of fraud a person may make a valid contract exempting himself from any liability to another which he may in the future incur as a result of his negligence or that of his agents or employees acting on his behalf" Sharon v. City of Newton, 437 Mass. 99, 105, 769 N.E.2d 738, 744 (2002) (quoting Schell v. Ford, 270 F.2d 384, 386) (1st Cir. 1959)) (internal quotation marks and ellipses omitted). Further, under Massachusetts law, a consequential damages exclusion clause — such as the liability exclusion included in Caterpillar's warranty — stands apart from other aspects of the contract and becomes void only if the exclusion is unconscionable. See Canal Elec. Co. v. Westinghouse Elec. Corp., 406 Mass. 369, 373, 548 N.E.2d 182, 185 (1990). A majority of other jurisdictions follow this approach as well. See Razor v. Hyundai Motor Am., No. 98813, 2006 WL 240746, at *7 (Ill. Feb. 2, 2006) ("This school of thought holds that a limitation of consequential damages must be judged on its own merits and enforced unless unconscionable, regardless of whether the contract also contains a limitation of remedy which has failed of its essential purpose.").

Canal Electric provides helpful guidance. There, the contract included "[limited] repair or replacement remedies, and clauses limiting total liability." Canal Elec., 406 Mass. at 371, 548 N.E.2d at 184.

The complaining party asserted that "because the limited repair or replacement remedy failed of its essential purpose ... it is entitled to all the remedies for breach provided in the Uniform Commercial Code that would otherwise be excluded by the 'Limitation of Liability' clause of the selling policies, including consequential damages." Id. 406 Mass. at 372, 548 N.E.2d at 184. The court found, however, that "[t]he disclaimer of consequential damages is an entirely separate contractual provision from the limited repair or replacement remedy and thus survives the failure of the limited remedy." Id. 406 Mass. at 375, 548 N.E.2d at 186. "The limited remedy of repair and a consequential damages exclusion are two discrete ways of attempting to limit recovery for breach of warranty .... The former survives unless it fails of its essential purpose, while the latter is valid unless it is unconscionable." Id. (quoting Chatlos Syss. v. Nat'l Cash Register Corp., 635 F.2d 1081, 1086 (3d Cir. 1980)).

The Canal Electric court emphasized the importance of providing commercial parties with the ability to allocate risk, noting that § 2-719 was "'intended to encourage and facilitate consensual allocations of risks associated with the sale of goods,' as long as minimum adequate remedies are available to a party injured by a breach." Id. 406 Mass. at 373, 548 N.E.2d at 185 (quoting V-M Corp. v. Bernard Distrib. Co., 447 F.2d 864, 869 (7th Cir. 1971)). Only an "independent" relationship between § 2-719(2) and § 2-719(3) satisfies this purpose. "If a limited remedy has not failed of its essential purpose, that is of course the buyer's only remedy, by definition — this is what it means to have a limited remedy. So in this circumstance a disclaimer of limited damages would

be of no effect because it would be redundant. If ... the disclaimer of limited damages ought not to be enforced when the limited remedy has failed of its essential purpose, the language would never have any effect." Razor, 2006 WL 240746, at * 10. Thus, only the "independent" approach makes exemption of consequential damages effective as a consensual allocation of risk. This approach also insures a minimum adequate remedy for the buyer. If the limited remedy does fail, § 2-719(2) provides the buyer with non-consequential damages as found in the Uniform Commercial Code ("UCC"). See Canal Elec., 406 Mass. at 375, 548 N.E.2d at 186. Therefore, even if the parties added an enforceable limitation of liability clause excluding consequential damages, if the limited remedy failed, a buyer would still have recourse under the UCC for non-consequential damages.

Accordingly, the agreed exclusion of liability provision is valid and enforceable regardless of whether the two year warranty failed of its essential purpose. As in Canal Electric, Caterpillar's "consequential damages disclaimer was a reasonable accommodation between two commercially sophisticated parties." 406 Mass. at 374, 548 N.E.2d at 185. It cannot be disputed that both Trans-Spec and Caterpillar are commercially sophisticated parties. Trans-Spec's assent to the contract represented a "clear intent to accept the risk of consequential damages." Id. Trans-Spec's negligence claim is, therefore, barred by contract unless the exclusion of liability provision is unconscionable.

Unconscionability

Trans-Spec maintains that the contracted exclusion of liability for negligence is unconscionable. The issue of unconscionability "is one of law for the court, and the test is to be made as of the time the contract was made." Zapatha v. Dairy Mart, Inc., 381 Mass. 284, 291, 408 N.E.2d 1370, 1375 (1980). Under Massachusetts law, "[a] court will declare a contract unconscionable in order to prevent oppression or unfair surprise." Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F.Supp. 363, 374-75 (D. Mass. 1991) (citing Mass. Gen. L. Ann ch. 106, § 2-302 comment 1 (West 1990)); Zapatha, 381 Mass. 292, 408 N.E.2d 1370). The question of oppression is, in turn, "directed to the substantive fairness to the parties of permitting the [contract] provisions to operate as written." Zapatha, 381 Mass. at 295, 408 N.E.2d at 1377.

Trans-Spec has not demonstrated any oppression by Caterpillar. Massachusetts law allows for the exclusion from liability of negligence through contract. See Sharon, 437 Mass. at 105, 796 N.E.2d at 744. "A party may, by agreement, allocate risk and exempt itself from liability that it might subsequently incur as a result of its own negligence." Id. Such exclusions can reflect "sensible business judgments." Minassian v. Ogden Suffolk Downs, Inc., 400 Mass. 490, 493, 509 N.E.2d 1190, 1192 (1987). More specifically, "limiting damages . . . where the two parties are sophisticated business entities, and where consequential damages . . . could be extensive, is a reasonable business practice." Deerskin Trading Post, Inc. v. Spencer Press, Inc., 398 Mass. 118, 124, 495 N.E.2d 303, 307 (1986). Both parties are sophisticated. Both

parties negotiated the subject contract provisions at arms-length. Both parties knew that extensive consequential damages could arise as a result of the consummation of this contract and had the ability to negotiate the allocation of that risk. It is not, therefore, substantively unfair to permit a negotiated and lawful exclusion of liability provision to operate as written.

Courts "view the question of unfair surprise as focused on the circumstances under which the agreement was entered into." Zapatha, 381 Mass. at 293, 408 N.E.2d at 1376-77. Trans-Spec's averment that it suffered unfair surprise and oppression because Caterpillar misrepresented the condition of the engines and knew of the engine defects prior to delivery is unconvincing.

First, Trans-Spec provides no evidence that at the time of contract Caterpillar made misrepresentations to Trans-Spec that would cause "an absence of meaningful choice." Zapatha at 294 n. 13, 408 N.E.2d at 1377 n. 13. In support of its position, Trans-Spec vaguely cites to deposition testimony of mostly non-Caterpillar employees that nowhere demonstrates either an affirmative misrepresentation nor Trans-Spec's reliance thereon.

Second, Trans-Spec relies on Caterpillar's patent, number 6,065,757, for a new flywheel housing to demonstrate that Caterpillar knew of the C-12's defects before providing them to Trans-Spec. At most, patent 6,065,757 demonstrates that Caterpillar continued to develop and make improvements to its products. When Caterpillar's inventors contrived a patentable improvement to the flywheel housing, they appropriately patented the new improvement, describing its improved function to distinguish it

from the earlier patent. Caterpillar's effort to improve on a piece of equipment can not be viewed as evidence that unimproved equipment was negligently designed or manufactured. See Fed. R. Evid. 407. If that were the case, litigators would flock to the U.S. Patent office, waiting to see when General Motors, Microsoft, or General Electric made improvements to their cars, software, or refrigerators, and then walk to court with a new lawsuit claiming injury for what must surely have been a negligent or reckless defect in the unimproved product. Such an argument is, of course, nonsensical.

Third, Trans-Spec avers that the exclusion of liability is unconscionable because it deprives Trans-Spec of minimum, adequate remedies. Trans-Spec correctly asserts that "[e]ven in the absence of unfair surprise . . . a court must consider whether the terms of the contract are oppressive and leave the allegedly disadvantaged party without adequate remedy." Andover Air Ltd. P'ship v. Piper Aircraft Corp., No. 87-0532-Z, 1989 WL 110453, at * 9 (D. Mass. Jan. 4, 1989) (citing Zapatha, 381 Mass. at 291-92, 408 N.E.2d at 1376-77). Unlike the plaintiff in Andover Air, however, Trans-Specs has not been deprived of a fair remedy. The facts in the instant case are incompatible with the rationale that made the Andover Air contract unconscionable. There, the exclusion of liability, which had an "additional exclusion of general damages," was considered unfair because the contract concerned an airplane. Id. By nature, "airframe failures are potentially and foreseeable catastrophic." Id. The exclusion would only hold the manufacturer "to the replacement or repair of [a part] costing perhaps tens of dollars when that defective part has allegedly caused damage to the aircraft in excess of

$100,000." Id. No such exclusion of general damages is present here and Trans-Spec negotiated and retained adequate minimum remedies under the warranty as well as through the UCC.

As previously discussed, the liability exclusion still left Trans-Spec with remedies under the UCC for non-consequential damages. Trans-Spec's own failure to exercise its rights to those remedies within the applicable statute of limitations does not extinguish the adequate minimum remedies available at the time the parties entered into the agreement.[21] Trans-Spec, therefore, was not deprived of minimum, adequate remedy and the exclusion of liability is not unconscionable.

Trans-Spec's Alternative Claim for Non-Consequential Damages

As detailed above, this Court has found that an exclusion of liability provision, negotiated at arms-length between sophisticated parties and not otherwise unconscionable, is enforceable even if warranties contained within the same contract fail of their essential purpose, because the two are independent components of the underlying contract. Trans-Spec offers, in response to Caterpillar's economic loss grounds for dismissal, that even if the exclusion of liability provision is enforceable, Trans-Spec may recover consequential damages under the UCC if the

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[21] See this Court's Report and Recommendation of January 31, 2006, subsequently adopted by Judge Lindsay on February 23, 2006, dismissing Count I (claims for breaches of warranties of merchantability and fitness and express warranties) as barred by the applicable statute of limitations.

warranty failed of its essential purpose.[22] While Trans-Spec's theory would have substantial support were it seeking non-consequential damages, Trans-Spec's argument becomes circular in light of this Court's findings above.

As previously discussed, both the limited remedy provision and exclusion of liability provision of a contract are independent of each other. An enforceable exclusion of liability for negligence would have no independent effect if it could be circumvented by creating a right to proceed with a negligence claim when a limited remedy provision failed of its essential purpose. Trans-Spec cannot accept Caterpillar's exclusion of liability and later claim a right to assert that same excluded liability based on the failure of a separate and independent provision in the contract. Trans-Spec took that risk when it negotiated and agreed to the contract. Therefore, because the contract specifically precludes recovery for negligence, Trans-Spec's claim, even if the limited remedy failed it essential purpose, may not succeed as a matter of law.

CONCLUSION

Caterpillar has met its burden for summary judgement, demonstrating an absence of a genuine issue of material fact. Celotex, 477 U.S. at 323. Likewise, the burden now shifted, Trans-Spec has not successfully fulfilled its obligation to demonstrate that a trier of fact reasonably could find in its favor. DeNovellis, 124 F.3d at 306. Without weighing

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[22] This Court makes no determination as to whether consequential damages would be available to Trans-Spec under the UCC in the absence of an exclusion of liability provision.

the credibility of the evidence and drawing all justifiable inferences in favor of the non-moving party, Trans-Spec, this Court finds no genuine issue of material fact and concludes that Caterpillar is entitled to judgment as a matter of law. Anderson, 477 U.S. at 249. Therefore, for the reasons articulated above, this Court RECOMMENDS that the District Court ALLOW Caterpillar's motion for summary judgment.

SO ORDERED.

12/1/06
Date

NOTICE TO THE PARTIES

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court the District Court of Massachusetts, any party who objects to this proposed Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of the Report and Recommendation. The written objections must specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271,273 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 687 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 604 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986).

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APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 2004-CV-11836-RCL

TRANS-SPEC TRUCK SERVICE, INC.,
d/b/a TRUCK SERVICE,
Plaintiff

v.

CATERPILLAR, INC.,
Defendant

MEMORANDUM AND ORDER ON

EMERGENCY MOTION OF THE PLAINTIFF
TO COMPEL PRODUCTION OF DOCUMENTS
AND TO EXTEND EXPERT DISCOVERY PERIOD
(Docket # 87)

and

CATERPILLAR INC.'S MOTION FOR
SANCTIONS, AND CERTIFICATE OF
CONFERENCE (Docket # 90)

and

MOTION TO AMEND COMPLAINT AND TO ALTER OR AMEND THIS COURT'S ORDER DATED FEBRUARY 26, 2006 AND LOCAL RULE 7.1 CERTIFICATE AND REQUEST FOR ORAL ARGUMENT (Docket # 100)

ALEXANDER, M.J.

On May 31, 2006, plaintiff Trans-Spec Truck Service, Inc., ("Trans-Spec") and defendant Caterpillar, Inc., appeared before this Court for a hearing ("the May 31 hearing") on a variety of motions: Trans-Spec's motions to amend its complaint and to compel the production of certain documents; and Caterpillar's motions for sanctions and for summary judgment. Trans-Spec's motion to compel and Caterpillar's motion for sanctions both relate to expert depositions that were originally scheduled to take place in February 2006. Following the May 31 hearing, this Court issued a brief electronic order that directed Caterpillar to produce the requested documents by June 14, 2006, and that the depositions in question should take place by June 30, 2006. This Order details the bases for the Court's ruling and also addresses Trans-Spec's motion to amend its complaint. A separate Report and Recommendation will issue on the motion for summary judgment.

The motions currently before the Court make up but one more chapter in the long story of Trans-Spec versus Caterpillar. This Court has previously iterated the background facts that led Trans-Spec to commence this action in its January 31, 2006, Report and Recommendation on Caterpillar's motion to dismiss and, briefly, in its May 20, 2005, order allow-

ing Trans-Spec's first motion to amend its complaint. The facts will not, therefore, be restated here. Where necessary, however, in discussing each of the pending motions, the relevant facts will be set forth.

Trans-Spec's Motion to Amend Its Complaint

On May 20, 2005, this Court allowed Trans-Spec's first motion to amend its complaint ("the May 20 Order"). As noted therein, Trans-Spec sought to add a claim of negligence to its original claims of breach of warranty and violation of Mass. Gen. Laws c. 93A. Following the allowance of Trans-Spec's motion, Caterpillar filed a motion to dismiss. That motion was referred to this Court for a Report and Recommendation, which this Court issued on January 31, 2006, recommending allowing in part and denying in part the motion to dismiss ("the Report and Recommendation"). More specifically, the Report and Recommendation recommended dismissing the breach of warranty and c. 93A claims but not the negligence claim.

Trans-Spec objected to the Report and Recommendation and in its objection also sought leave to amend its complaint again. The District Judge adopted the Report and Recommendation, on February 23, 2006, but did not specifically address the motion to amend, leading Trans-Spec to file yet another motion to amend. Trans-Spec this time seeks leave not only to amend its complaint, but also to "alter or amend" the District Judge's order adopting the Report and Recommendation.

As they do with so many aspects of this case, the parties disagree as to the standard that this Court should apply in deciding Trans-Spec's motion. Trans-

Spec avers that Fed. R. Civ. P. 15(a), which governs motions to amend pleadings and states that "leave shall be freely given when justice so requires," dictates that the Court should allow Trans-Spec to amend its complaint. Caterpillar, on the other hand, contends that Fed. R. Civ. P. 16 applies in circumstances such as this where a motion to amend a complaint is filed after the scheduling order deadlines to do so have expired. Caterpillar is correct, as Trans-Spec should know, given that this Court addressed the very same issue in the May 20 Order. There, the Court stated that

> [i]f a motion to amend a pleading is filed after a deadline for such motions, however, Rule 15, and its "freely given" standard, gives way to Fed. R. Civ. P. 16(b). O'Connell v. Hyatt Hotels of Puerto Rico, 357 F.3d 152, 154 (1st Cir. 2004) (Rule 16(b), rather than Rule 15, governs motions to amend filed after scheduling order deadline). Rule 16(b) requires the District Court to set a scheduling order for certain events in a civil proceeding, and states, as well, that "[a] schedule shall not be modified except upon a showing of good cause . . . ." Fed. R. Civ. P. 16(b).

May 20 Order at 3-4. Rule 16, and its "good cause" standard, govern the extant motion.

Trans-Spec's previous motion to amend was filed, like its current motion, after the scheduling order

deadline had expired. The previous motion, however, was filed only eight days late, and, as stated in the May 20 Order, although the Court "does not generally condone filing documents out of time . . . the Court can not say that Trans-Spec has not been assiduously pursuing its claims. The Court will not deny the motion to amend on the basis that it was filed too late." Id. at 5. The current motion, on the other hand, was filed eleven (11) months after the March 23, 2005, deadline.[23] Although the Court recognizes that Trans-Spec filed the motion in response to the District Court's adoption, on February 23, 2006, of the Report and Recommendation ("the February 23 Order"), Trans-Spec cannot expect to be allowed to amend a complaint every time a motion to dismiss disposes of some or all of its claims.

Trans-Spec asseverates that it should be allowed to amend its complaint because it learned certain information during the course of discovery that bears on its claims and remedies the problems that led to the motion to dismiss. The Court is not convinced. Trans-Spec, simply put, has failed to demonstrate "good cause." The cases that Trans-Spec cites in support of its contention that courts often allow motions to amend complaints after motions to dismiss have been allowed are inapposite. None of those cases appear to involve circumstances such as those Trans-Spec faces here – that is, none of them discuss the problem of how to treat a motion to amend under Fed. R. Civ. P. 16(a). Gaffney v. Silk, 488 F.2d 1248 (1st Cir. 1973), for example, involved a motion to amend a complaint after dismissal where the motion

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[23] To the extent that the District Court amended the scheduling order on October 26, 2005, it did so only as to expert discovery and the filing of dispositive motions.

to dismiss was filed at the same time as the answer. Id. at 1249-50. Similarly, Williams v. Astra USA, Inc., 68 F. Supp. 2d 29 (D. Mass. 1999), also appears to involve amending a complaint after a motion to dismiss where the motion to dismiss was filed early-on in the life of the case. Id. at 31. The cases simply do not provide support for Trans-Spec in the current posture of this case.

Finally, to the extent that Trans-Spec's motion also seeks to "alter or amend" the District Court's February 23 Order, such a request is not properly before this Court. As Caterpillar notes, Fed. R. Civ. P. 59(e) – the rule under which Trans-Spec purports to brings its motion – applies to altering or amending a "judgment." A motion to dismiss certain claims within a complaint does not so qualify – no judgment has been entered in this case. Trans-Spec's motion to amend its complaint or to alter or amend the District Court's February 23 Order is therefore DENIED.

Trans-Spec's Emergency Motion to Compel

As noted *supra*, this Court issued an Order on May 31, 2006, directing Caterpillar to produce certain documents, requested by Trans-Spec in anticipation of deposing Caterpillar's expert witnesses, by June 14, 2006. The Order also stated that the depositions themselves must take place by June 30, 2006. The Court now details the bases for that Order.

On January 13, 2006, Caterpillar served five expert reports on Trans-Spec. Trans-Spec then, on January 31, 2006, noticed the depositions of four of the experts to take place, by agreement of the parties, in Peoria, IL, the week of February 13, 2006, and one to take place in Colorado on February 24,

2006. Trans-Spec avers that because the reports contained complex information, Trans-Spec also sought the production of documents on or before February 9, 2006, so that it could review the documents prior to the depositions and conduct the depositions more efficiently. Additionally, Trans-Spec has also asserted, both in the motion and at the May 31 hearing, that it was possible that its review of the documents would obviate the need to conduct the depositions.

On February 8, counsel for Caterpillar indicated that they would not be producing documents prior to the depositions. That same day, counsel for Trans-Spec verbally notified counsel for Caterpillar that Trans-Spec did not intend to go forward with the depositions as scheduled. A faxed letter confirming Trans-Spec's position was received in Caterpillar's counsel's office the morning of Thursday, February 9, shortly before counsel was scheduled to fly to Illinois (counsel was in fact already at the airport) to begin preparing the experts for the following week's depositions. Memorandum in Support of Caterpillar Inc.'s Motion for Sanctions ("Caterpillar's Memo) Ex. 4 (Letter from Nancy M. Reimer to John A.K. Grunert dated February 9, 2006). Despite the fax, Caterpillar asserts that Trans-Spec would not commit unequivocally to cancelling the deposition and that Caterpillar's counsel was therefore forced to fly to Illinois in case the depositions did go forward.

Trans-Spec's position at the time was that it would not go forward with the depositions unless the documents were produced ahead of time. Although Trans-Spec had not yet filed its emergency motion at the time counsel for Caterpillar was preparing to fly to Illinois, Trans-Spec had indicated its intent to do so that day. When asked by Caterpillar if it was

"cancelling" the depositions regardless of the outcome of the emergency motion, Trans-Spec responded "No, we are not cancelling the depositions regardless of the outcome of the emergency motion." Caterpillar's Memorandum Ex. 5 (Email from Christian Samito to John A.K. Grunert dated February 9, 2006). Trans-Spec also stated, via email and fax, that Trans-Spec "would not proceed with the depositions as noticed and [would] seek an emergency court order requiring the production of the documents prior to the taking of the depositions." Caterpillar's Memo Ex. 4. Thereafter, on Thursday, February 9, 2006, Trans-Spec filed the its emergency motion to compel. After filing its objections to the motion, Caterpillar filed a motion for sanctions, seeking $14,119.85 in attorneys fees and travel expenses incurred traveling to Illinois and preparing witnesses for depositions that did not occur.

Caterpillar objects to producing the documents requested by Trans-Spec in part on the basis that Trans-Spec's demand that the documents be produced prior to the depositions was unreasonable. According to Caterpillar, Trans-Spec did not provide any warning, prior to the service of the deposition notices on January 30, that it would like copies of the documents prior to the depositions. Caterpillar also avers that the request is not considered by the rules, and that the customary practice is to provide documents at the time of the depositions. It seems, from Caterpillar's asseverations, that if Caterpillar had been given more advanced notice that Trans-Spec wanted the documents prior to the depositions, Caterpillar might have been willing and able to comply. Indeed, at the May 31 hearing Caterpillar

indicated that it had produced many of the documents already.

Caterpillar asseverates that the Federal Rules of Civil Procedure do not contemplate or require it to produce the requested documents prior to the depositions. This Court, however, has broad discretion to manage discovery. E.g., Fusco v. Gen'l Motors Corp., 11 F.3d 259, 267 (1st Cir. 1993). The parties' squabbling over discovery matters has gone on long enough. To the extent that Trans-Spec seeks the production of documents prior to the depositions of Caterpillar's expert witnesses, the Court ALLOWS Trans-Spec's emergency motion to compel. As previously ordered, and as the Court stated from the bench at the May 31 hearing, the documents are to be produced by June 14, 2006, and the depositions are to take place by June 30, 2006. The Court also ALLOWS that part of Trans-Spec's motion that seeks to extend the discovery deadline, but only to the extent necessary to comply with this Order – that is, the parties have until June 30, 2006, to conduct the expert depositions. Finally, the Court DENIES Trans-Spec's motion to the extent that the deadlines suggested therein are no longer valid.

Caterpillar's Motion for Sanctions

Opposing counsel in this case have a deep-seated mistrust of each other. At the May 31 hearing, counsel for Caterpillar emphasized that at the time he departed for Illinois, Trans-Spec had not yet filed its emergency motion to compel and that because he did not know what the Court's response to the motion would be, he had to travel to Illinois to prepare the witnesses for their depositions. It is beyond perad-

venture that this should never have happened. Caterpillar's counsel knew that Trans-Spec's counsel was going to file an emergency motion, and while it is true that neither side knew how, and how quickly, the Court might respond, reasonable counsel should have been able to come to some kind of consensus on the status of the depositions prior to Caterpillar's counsel's departure.

Why there was no agreement between the parties that they would await a ruling on the motion and act accordingly thereafter is beyond this Court's ken. An emergency motion that could potentially postpone the depositions should have been sufficient motive for Caterpillar's counsel to cancel his travel plans to Illinois. And Trans-Spec's counsel could have perhaps done more to assure Caterpillar's counsel that it would not expect Caterpillar and its witnesses to be prepared for the depositions on the dates scheduled, given the fact that it was seeking Court intervention to remedy a related dispute. The Court realizes that the parties were facing a discovery deadline, but does not find this to be a basis for the actions that ensued. Caterpillar's motion for sanctions is DENIED.

CONCLUSION

For the foregoing reasons, this Court DENIES Trans-Spec's motion to amend its complaint; ALLOWS IN PART and DENIES IN PART Trans-Spec's emergency motion to compel; and DENIES Caterpillar's motion for sanctions.

SO ORDERED.

6/9/06 /s/ Joyce London Alexander
Date United States Magistrate Judge

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APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 2004-CV-11836-RCL

TRANS-SPEC TRUCK SERVICE, INC.,
d/b/a TRUCK SERVICE,
Plaintiff

v.

CATERPILLAR, INC.,
Defendant

REPORT AND RECOMMENDATION ON

CATERPILLAR INC.'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) AND CERTIFICATE OF CONFERENCE
(Docket # 53)

and

CATERPILLAR INC.'S MOTION TO STRIKE ATTACHMENTS TO PLAINTIFF'S OPPOSITION TO CATERPILLAR'S MOTION TO DISMISS THE COMPLAINT AND TO STRIKE PORTIONS OF THE OPPOSITION ITSELF, AND CERTIFICATE OF LOCAL RULE 7.1 CONFERENCE
(Docket # 56)

ALEXANDER, M.J.

On May 20, 2005, this Court allowed the motion of plaintiff Trans-Spec Truck Service, Inc., d/b/a Truck Service ("Trans-Spec"), to amend its complaint to add a new claim. Shortly thereafter, defendant Caterpillar, Inc., moved to dismiss the second amended complaint pursuant to Fed. R. Civ. P. 12(b)(6). That motion was referred to this Court for a Report and Recommendation. After a hearing on the motion and careful consideration of the parties' asseverations, both oral and written, and for the reasons set forth more fully below, this Court now recommends that the District Court ALLOW IN PART and DENY IN PART Caterpillar's motion to dismiss.

RELEVANT BACKGROUND

As with any motions to dismiss, this Court must accept as true all wellpleaded facts and extend Trans-Spec the benefit of all reasonable inferences. Raytheon Co. v. Cont'l Cas. Co., 123 F. Supp. 2d 22, 24 (D. Mass. 2000). With this standard in mind, the facts underlying this case, as taken from Trans-Spec's second amended complaint, are as follows.

In March 1999, Trans-Spec and Sterling Truck Corporation ("Sterling") prepared a "specification proposal" for twenty-two heavy-duty custom-built trucks that Trans-Spec anticipated purchasing from Sterling and using for its oil delivery service and dump trailer operations.[24] Second Amended Complaint and Jury Claim ("Cmpl") ¶ 8. The proposal called for the installation of a C-12 model engines, manufactured by Caterpillar, in each of the trucks.

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[24] Sterling is not a party to this lawsuit.

Id. After finalizing the deal, Caterpillar shipped completely-assembled C-12 engines to Sterling, who then installed the engines in the trucks. Id. ¶ 11. Trans-Spec accepted delivery of the trucks in December 1999 and January 2000. Id. ¶ 12.

By 2001, serious problems began to occur with the C-12 engines. Id. ¶ 14. More specifically, the flywheel housings began to loosen from the engines, leading to disruptions in the use of the trucks. Id. ¶¶ 14, 15. Although Caterpillar reimbursed Trans-Spec for repairs to six of the trucks that had experienced flywheel housing failure in 2001 and 2002, when a seventh truck became inoperable due to engine difficulties Caterpillar refused to pay for any additional repairs. Id. ¶¶ 14-15. Furthermore, according to Trans-Spec, Caterpillar failed to take appropriate remedial steps to address the problems once Caterpillar became aware of them. Id. ¶ 16. The engine problems have also resulted in several of the trucks leaking oil, sometimes while a truck was at a job site, and in violation of environmental laws. Id. ¶ 23. Trans-Spec also asserts that without a fully operational fleet, the transportation of heating oil in Massachusetts will be crippled. Id. ¶ 31.

Since the problems began, an average of six Trans-Spec trucks have been inoperable at any given time because of engine-related issues. Id. ¶ 16. At times, up to ten trucks have been out of service at once. Id. Additionally, two of Trans-Specs trucks are now permanently disabled because their engine blocks are completely broken. Id. ¶ 15. Trans-Spec's business requires that it operate all of its trucks six days a week and trucks such as the ones that Trans-Spec uses can not be rented for temporary use. Id. ¶ 16.

Trans-Spec has also had to perform its own in-house repairs, with Caterpillar's consent, on the flywheel housings of sixteen trucks. Id. ¶ 20. In some instances, the flywheel housing had to be repaired multiple times on the same trucks. Id. ¶ 21. Although Trans-Spec was conducting its own repairs, it avers that, pursuant to Caterpillar's warranty, Caterpillar actually should have been performing the repairs. Id. ¶ 22. Additionally, although the industry standard, according to Trans-Spec, is to have one mechanic per twenty-two trucks, Trans-Spec was forced to employ three additional mechanics to deal with the constant breakdowns. Id. ¶ 25. In January 2004, Sterling agreed, upon Caterpillar's demand, to supply transmission mounts to be installed in the trucks in an effort to help remedy the problems. Id. ¶ 18. The transmission mounts proved to be of no effect. Id. ¶ 19.

Then, in June 2004, Caterpillar stated that it would repair the engine breakdowns pursuant to its warranty. Id. ¶ 27. In August 2004, Caterpillar reiterated that it needed to address the problems and that the problems were not Trans-Spec's fault. Id. ¶ 28. That same month, however, Trans-Spec initiated the extant suit. Trans-Spec's first amended complaint includes claims for breach of warranties of merchantability and fitness and express warranties and for a violation of Mass. Gen. Laws c. 93A. Its second amended complaint, which Caterpillar now seeks to dismiss, adds a claim of negligence.[25]

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[25] Trans-Spec's first amended complaint also included a claim for declaratory relief. That claim was not included in the second amended complaint.

ANALYSIS

The purpose of a motion to dismiss is to determine whether a complaint, in accordance with Fed. R. Civ. P. 8(a)(2), contains "a short and plain statement of the claim showing that the pleader is entitled to relief." E.g., Raytheon Co., 123 F.Supp. 2d at 26. Pursuant to this standard, a plaintiff need not "set out in detail the facts upon which he bases his claims." Id. at 27 (citing Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

It is well established that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Castegneto v. Corporate Express, Inc., 13 F. Supp. 2d 114, 116 (D. Mass. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "'[T]he issue is not whether the plaintiff will ultimately prevail, but whether that party is entitled to offer evidence to support its claims.'" Raytheon, 123 F. Supp. 2d at 27 (quoting Day v. Fallon Cmty. Health Plan, Inc., 917 F. Supp. 72, 75 (D. Mass. 1996)). Therefore, the District Court may only dismiss Trans-Spec's claims if, extending every reasonable inference in Trans-Spec's favor, it finds that Trans-Spec's claims are legally insufficient to state a claim. Coyne v. City of Somerville, 972 F.2d 440, 442-43 (1st Cir. 1992). With this standard in mind, the Court turns to Trans-Spec's claims and Caterpillar's asseverations in favor of dismissal.

Count I – Breach of Warranty

Estoppel

Count I of Trans-Spec's second amended complaint alleges breaches of warranties of merchantability and fitness and express warranties.[26] Caterpillar asserts that any breach of warranty claim is subject to the four year statute of limitations contained in G. L. c. 106, § 2-725. Section 2-725 states, in pertinent part, that

> (1) [a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. . . .
>
> (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

A breach occurs, and a cause action accrues, in cases involving a contract of sale when the goods in ques-

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[26] To the extent that Trans-Spec also alleges a claim under the Magnusson-Moss Warranty Act, 15 U.S.C. § 2301 *et seq.*, Trans-Spec has conceded that the Act does not apply in this case.

tion are delivered. See Coady v. Marvin Lumber & Cedar Co., 167 F. Supp. 2d 166, 170 (D. Mass. 2001) (breach of implied warranty occurred when plaintiff purchased windows from defendant); Bay State-Spray & Provincetown Steamship, Inc. v. Caterpillar Tractor Co., 404 Mass. 103, 106-07, 533 N.E.2d 1350, 1353 (1989) (breach of warranty occurred no later than when ship was delivered to plaintiff). "[T]he cause of action accrued when the breach occurred 'regardless of the aggrieved party's lack of knowledge of the breach.'" Id., at 106, 533 N.E.2d at 1353 (quoting § 2-725).

Trans-Spec's cause of action against Caterpillar for breach of warranty, therefore, accrued in January 2000, when all of the trucks had been received by Trans-Spec. Trans-Spec, however, did not commence this action until August 2004, more than four years after the cause of action accrued. Although Trans-Spec does not dispute the applicability of § 2-725, Trans-Spec asseverates that Caterpillar's own actions estop Caterpillar from asserting a statute of limitations defense.

"Under Massachusetts law, if a plaintiff is to escape the consequences of his lack of diligence in bringing his action, it must be by way of proof that the defendant lulled the plaintiff into the delay." Coady, 167 F. Supp. 2d at 171 (citing New England Power Co. v. Riley Stoker Corp., 20 Mass. App. Ct. 25, 32, 477 N.E. 2d 1054 (1985)). For estoppel to apply, a plaintiff must show

> (1) that [the defendant] made representations that it knew or should have known would induce the [plaintiff] to postpone bringing a suit;

> (2) that [the plaintiff] did in fact delay bringing a suit in reliance on those representations; and
>
> (3) that reliance on those representations was reasonable.

Kozikowski v. Toll Bros. Inc., 354 F.3d 16, 24 (1st Cir. 2003) (citing O'Blenes v. Zoning Bd. of Appeals of Lynn, 397 Mass. 555, 558, 492 N.E.2d 354 (1986)). See also Coady, 167 F. Supp. 2d at 171. Trans-Spec asserts that it "declined to file suit" prior to August 2004 in reliance on assurances from Caterpillar that it would compensate Trans-Spec for the damages that Trans-Spec suffered. The facts alleged in Trans-Spec's complaint, however, even if true, fail to support this assertion.

Trans-Spec alleges, for example, that although Caterpillar did, initially, reimburse Trans-Spec for repairs to Trans-Spec's trucks in 2001 and 2002, Caterpillar ultimately stopped doing so and refused to pay for any additional repairs. Although the second amended complaint does not state when this occurred, it appears that it was in 2002. There is no indication in the complaint of what might have transpired between 2002 and January 2004, when Caterpillar demanded that Sterling supply transmission mounts for the trucks in an effort to remedy the problems. Even if Trans-Spec reasonably relied on Caterpillar's initial reimbursements as "representations" that would have induced Trans-Spec to refrain from filing suit, the reimbursements ceased well before the statute of limitations expired on the breach of warranty claims.

Trans-Spec also states that in June 2004 representatives from Trans-Spec, Caterpillar and Sterling met to discuss the continuing problems that Trans-Spec was experiencing with its trucks. As Caterpillar averred at the hearing on the motion to dismiss, however, these meetings themselves took place after the statute of limitations had expired, and Trans-Spec can not, therefore, rely on them in support of estoppel. Trans-Spec's estoppel asseverations are unavailing.

Future performance

Trans-Spec also asserts that the express warranty provided by Caterpillar extended to future performance and that, therefore, the cause of action accrued not at the time of delivery – January 2000 – but when Trans-Spec discovered a problem with the C-12 engines – some time in 2001. Section 2-725 does provide an exception to the four-year statute of limitations for express warranties that explicitly extend to future performance. G. L. c. 106, § 725. In determining whether a warranty extends to future performance, "courts have emphasized the word 'explicitly,' construing that requirement to mean that a warranty must specify a particular future time." Coady, 167 F. Supp. 2d. at 170 (citing Raytheon Co. v. Helix Technology Corp., 1999 WL 753483, *3 (Mass. Super. 1999)).

Trans-Spec avers that Caterpillar's extended service coverage includes payment for components and labor charges for "covered failures" for five years or five hundred thousand miles and, indeed the On-Highway Vehicle Engine Extended Service Coverage certificate states coverage for sixty (60) months (five

years) and coverage miles of 500,000. This type of warranty, however, that offers to repair or replace defective parts, does not constitute an explicit warranty of future performance. See, e.g., Ontario Hydro v. Zallea Systems, Inc., 569 F. Supp. 1261, 1266 (D. Del. 1983). See also New England Power Co. v. Riley Stoker Corp., 20 Mass. App. Ct. 25, 30, 477 N.E.2d 1054, 1058 (1985). "[A] repair or replacement warranty does not warrant how the goods will perform in the future. Rather, such a warranty simply provides that if a product fails or becomes defective, the seller will replace or repair within a stated period." Id. Caterpillar's warranty does not explicitly provide for future performance of the engines. Trans-Spec's assertions that the cause of action did not accrue until the time that it learned of the engines' problems must, therefore, fail.

Because Caterpillar is not estopped from asserting a statute of limitations defense and because Trans-Spec has no other means to avoid the statute of limitations, Trans-Spec can not maintain its breach of warranty claim. The claim is barred by the statute of limitations and this Court therefore RECOMMENDS that the District Court ALLOW Caterpillar's motion to dismiss count I of Trans-Spec's second amended complaint.

Count II – Violation of G. L. c. 93A

Trans-Spec's second claim alleges that Caterpillar, by breaching its warranties, has also violated G. L. c. 93A. Because the 93A claim is based on the breach of warranty claim, it is subject to the same four year statute of limitations that applies to, and accrued at the same time as, the breach of warranty

claim. The 93A claim, therefore, is also barred by the statute of limitations and this Court RECOMMENDS that the District Court ALLOW Caterpillar's motion to dismiss count II of Trans-Spec's second amended complaint.

Count III – Negligence

Finally, Trans-Spec alleges that its injuries were the direct and proximate result of Caterpillar's negligent design, development, assembly, manufacture, inspection, testing, marketing, advertising, and distribution of the C-12 engines. Caterpillar contends that Trans-Spec's negligence claim alleges only economic loss and that the claim is therefore barred by the economic loss doctrine.

This Court addressed the economic loss doctrine in its May 20, 2005, order allowing Trans-Spec to amend its complaint ("the Order"). As discussed in the Order, Massachusetts law states that

> [i]n the absence of personal injury or physical damage to property, the negligent supplier of a defective product is not ordinarily liable in tort for simple economic loss.

Berish v. Bornstein, 437 Mass. 252, 267 (2002). See also, Arthur D. Little Int'l, Inc., v. Dooyang Corp., 928 F. Supp. 1189, 1202 (D. Mass. 1996). Economic loss, in turn, includes

> "damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits

> without any claim of personal injury or damage to other property."

Id. (quoting *Marcil* v. *John Deere Indus. Equip. Co.*, 9 Mass. App. Ct. 625, 630 n. 3)).

In addition to re-iterating its position as to why the economic loss doctrine does not apply, Trans-Spec also points out, correctly, that the standard that this Court applied in allowing Trans-Spec to amend its complaint is the same standard that applies here. In assessing Trans-Spec's motion to amend to allow the negligence claim, this Court looked to Fed. R. Civ. P. 12(b)(6), the same rule that governs the extant motion to dismiss.[27] Therefore, for the reasons stated in the Order, this Court must RECOMMEND that the District Court DENY Caterpillar's motion to dismiss count III of Trans-Spec's second amended complaint.

MOTION TO STRIKE

In connection with its motion to dismiss, Caterpillar has moved to strike Exhibits A through K to Trans-Spec's opposition to the motion to dismiss as well as pages eight through thirteen of the opposition itself. Caterpillar avers, in short, that the Court, in considering a motion to dismiss, can not consider any documents outside of, or not incorporated in to, the complaint. Trans-Spec counters that it has the

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[27] Trans-Spec avers that pursuant to the Order its second amended complaint in its entirety must be sufficient. The Order, however, was concerned only with the claim that Trans-Spec sought to add in its second amended complaint – the negligence claim. The Order does not, therefore, dictate that Trans-Spec's breach of warranty and 93A claims must also survive Caterpillar's motion to dismiss.

right to present materials outside of the pleadings even if this means that the Court, at its discretion, converts Caterpillar's motion to dismiss to a motion for summary judgment.

Both parties are correct. "Ordinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein, unless the motion is converted into one for summary judgment." Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co., 267 F.3d 30, 33 (1st Cir. 2001) (citing Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993)). Additionally,

> [a] motion to dismiss is not automatically transformed into a motion for summary judgment simply because matters outside the pleadings are filed with, and not expressly rejected by, the district court. If the district court chooses to ignore the supplementary materials and determines the motion under the 12(b)(6) standard, no conversion occurs.

Garrita Hotel Ltd. P'ship v. Ponce Fed. Bank, F.S.B., 958 F.2d 15, 18 (1st Cir. 1992).

The Court has not considered any of the documents submitted by Trans-Spec, other than the exhibits included with the complaint, and declines to convert Caterpillar's motion to dismiss in to a motion for summary judgment. Although the Court need not expressly reject the other documents submitted by Trans-Spec, the Court recommends that the District Court allow Caterpillar's motion to strike exhibits A-K of Trans-Spec's opposition to the motion to dismiss. Although Caterpillar also seeks to strike pages

eight through thirteen of Trans-Spec's opposition, the Court does not recommend that the District Court allow this portion of Caterpillar's motion. Trans-Spec does refer to the exhibits on those pages, but other, acceptable, information is included as well. This Court did not rely on the exhibits in reaching its recommendations on the motion to dismiss and those pages of the opposition need not be struck.

CONCLUSION

For the foregoing reasons, this Court RECOMMENDS that the District Court ALLOW IN PART and DENY IN PART Caterpillar's motion to dismiss Trans-Spec's second amended complaint and ALLOW IN PART and DENY IN PART Caterpillar's motion to strike.

SO ORDERED.

1/31/06 JOYCE LONDON ALEXANDER
Date United States Magistrate Judge

NOTICE TO THE PARTIES

The parties are hereby advised that under the provisions of Rule 3(b) of the Rules for United States Magistrate Judges in the United States District Court the District Court of Massachusetts, any party who objects to this proposed Report and Recommendation must file a written objection thereto with the Clerk of this Court within ten (10) days of the party's receipt of the Report and Recommendation. The written objections must specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271,273 (1st Cir. 1988); United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 687 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603,604 (1st Cir. 1980); see also Thomas v. Arn, 474 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986).

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No. 08-283

SEP 23 2008

IN THE

Supreme Court of the United States

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE,

Petitioner,

v.

CATERPILLAR INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 23, 2008

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Caterpillar Inc. ("Caterpillar") does not believe it is appropriate for it to try to restate any of the Questions Presented set forth by Trans-Spec Truck Service, Inc. ("Trans-Spec") in its Petition. There are no questions appropriate for review on certiorari presented by the decisions below.

RULE 29.6 STATEMENT

Caterpillar is a publicly held corporation. It has no parent corporation and no publicly held company owns 10% or more of its stock.

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I. Federal law, including the law from this Court and from the several circuits, is clear, unanimous, and well-settled that a complaint is appropriately dismissed under Fed. R. Civ. P. 12(b)(6) when the averments of the complaint, accepted as true, affirmatively show the claim is barred by the applicable statute of limitations. That is what occurred here. Trans-Spec waived any ar-

gument that the district court abused its discretion in refusing to consider materials extrinsic to the second amended complaint in opposition to the motion to dismiss and, in any event, there was no abuse of discretion. Trans-Spec's assertion that it could not anticipate the statute of limitations issue is based on misrepresentation of the record, the statute of limitations having been raised as an affirmative defense to the first amended complaint months before Trans-Spec filed the second amended complaint which was dismissed. 9

II. Federal law is clear, unanimous, and well-settled that, after the deadline for amendments to the pleadings established by a Fed. R. Civ. P. 16(b) scheduling order has expired, a plaintiff wishing to amend its complaint must first show good cause for revising the scheduling order, including a showing that the proposed amendment could not with reasonable diligence have been made before the deadline was reached. The cases Trans-Spec cites for the contrary position were either decided before the governing language of Rule 16(b) was enacted in 1983 or did not involve cases in which the Rule

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OPINIONS AND ORDERS ENTERED IN THE CASE

Trans-Spec's citation of the opinions and orders entered below is incomplete because it omits the district court's original Fed R. Civ. P. 16(b) scheduling order and the later orders amending it, the district judge's order adopting the magistrate-judge's recommendations with respect to the motion to dismiss and the motion to strike, and the district judge's order overruling Trans-Spec's motion for reconsideration of the magistrate-judge's denial of its motion to amend the second amended complaint or to alter or amend judgment and adopting her rulings on those subjects. Those orders, all of which are unreported, were entered on the docket but were not memorialized in separate documents. They are set forth in the Appendix to this Brief, *infra* at 1a to 3a.

JURISDICTION

Caterpillar is satisfied with Trans-Spec's jurisdictional statement.

PROVISIONS INVOLVED IN THE CASE

Trans-Spec's recitation of the relevant procedural rules is materially incomplete. The relevant provisions of Fed. R. Civ. P. 16, which is controlling with respect to Trans-Spec's Question II, are:

> (b) Scheduling
>
> (1) *Scheduling Order.* Except in categories of actions exempted by local

> rule, the district judge – or a magistrate judge when authorized by local rule – must issue a scheduling order ...
>
> *****
>
> (3) *Contents of the Order.*
>
> (A) *Required Contents.* The scheduling order must limit the time to join other parties, amend the pleadings, complete discovery, and file motions.
>
> *****
>
> (4) *Modifying a Schedule.* A schedule may be modified only for good cause and with the judge's consent.

Rule 16.1 of the Local Rules for the United States District Court for the District of Massachusetts, also relevant to Question II, provides in pertinent part:

> (F) *Scheduling Orders.* Following the [scheduling] conference, the judge shall enter a scheduling order that will govern the pretrial phase of the case. Unless the judge determines otherwise, the scheduling order shall include specific deadlines or general time frameworks for:
>
> (1) amendments to the pleadings;
>
> *****

(G) *Modification of Scheduling Order.* The scheduling order shall specify that its provisions, including any deadlines, having been established with the participation of all parties, can be modified only by order of the judge, or the magistrate judge if so authorized by the judge, and only upon a showing of good cause supported by affidavits, other evidentiary materials, or references to pertinent portions of the record.

STATEMENT OF THE CASE

Caterpillar does not believe any of Trans-Spec's "Questions Presented" merit review. Caterpillar has nonetheless addressed in this section and in its argument the proceedings below that are relevant to Trans-Spec's first two questions. Those two at least involve federal law and, equally important, Trans-Spec's arguments with respect to them are based in part on material misrepresentations of the record which Caterpillar believes Supreme Court Rule 15.2. requires it to call to the Court's attention. Trans-Spec's Question III on its face concerns only Massachusetts state law; its Question IV, though phrased to suggest it involves federal law, appears on review of Trans-Spec's related argument, Petition at 30-32, likewise to involve only state law. Caterpillar therefore does not think discussion related to Questions III and IV is necessary in this Brief except to say there was no error on those subjects below.

Trans-Spec filed its original three-count complaint on August 23, 2004. App. I: 4-5.[1] Count I alleged breach of an express warranty given pursuant to Mass. Gen. Laws c. 106, §2-313 and implied warranties of merchantability and fitness for a particular purpose created by Mass. Gen. Laws c. 106, §§2-314 and 2-315;[2] it also alleged violation of the Magnusson-Moss Warranty Act, 15 U.S.C. §2391 *et seq.*[3] Count II alleged violation of Mass. Gen. Laws c. 93A by virtue of the alleged breaches of warranty described in Count I.[4] Count III sought a preliminary injunction. App. I: 24-31. Exhibit C to the original complaint, App. I: 53-57, was entitled On-Highway Vehicle Extended Service Coverage. The original complaint identified Exhibit C as the express warranty referenced in Count I. App. I: 26, ¶22. Trans-Spec amended the complaint as of right a few days after filing it to correct a spelling error. App. I: 5 (#3). As pertinent here, the original and first amended complaints averred that Trans-Spec purchased 22 custom-built trucks from the non-party Sterling Truck Corporation for use in its business;

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[1] Cites in this form are to the record appendix filed in the court of appeals.

[2] Mass. Gen. Laws c. 106 is Massachusetts' version of the Uniform Commercial Code.

[3] Dismissal of the Magnusson-Moss claim was not opposed or appealed by Trans-Spec and is not raised as an issue in the Petition.

[4] Mass. Gen. Laws c. 93A is Massachusetts' consumer protection act. A regulation promulgated by the Massachusetts attorney-general pursuant to authority granted by Mass. Gen. Laws c. 93A, §2, provides that a breach of warranty in and of itself can constitute a violation of Chapter 93A. *Burnham v. Mark IV Homes, Inc.*, 387 Mass. 575, 581, 441 N.E.2d 1027, 1031 (1987).

the trucks were equipped with Caterpillar C-12 engines; Trans-Spec took delivery in December, 1999, and January, 2000; and beginning in 2001 Trans-Spec experienced problems with flywheel housings on many of the engines. Caterpillar answered the first amended complaint on September 20, 2004, including in its answer *inter alia* an affirmative defense asserting that the claims were barred by the applicable statutes of limitation. App. I: 5 (#15) and 125.

The district judge convened a scheduling conference pursuant to Fed. R. Civ. P. 16(b) and Local Rule 16.1 on October 27, 2004. His scheduling order entered the next day established, among other things, a March 23, 2005, deadline for motions to amend the pleadings. *Infra* at 1a; App. I: 6. On March 31, 2005, Trans-Spec moved for leave to amend its complaint a second time. App. I: 7 (#36). Counts I and II of the proposed second amended complaint, App. II: 190-196, were materially identical to the same counts in the first amended complaint. The original claim for a preliminary injunction was deleted and a new Count III alleged negligence. App. II: 196. Caterpillar opposed the motion for the reason, among others, that it was untimely under the scheduling order and no good cause for relief from the order had been shown, App. II: 137-143, but the magistrate-judge granted the motion because it was only eight days late. App. II: 185. On May 20, 2005, the parties jointly moved to amend the scheduling order in various respects, not including the deadline for amendments to the pleadings, and their motion was allowed. App. I: 9 and App. II: 179-180; *infra* at 1a-2a.

Trans-Spec filed its second amended complaint on May 24, 2005. App. I: 9 (#50) and App: II: 190-221. On May 26, 2005, Caterpillar moved to dismiss it in

its entirety pursuant to Fed. R. Civ. P. 12(b)(6). App. I: 9 (#53) and App. II: 222-224. Trans-Spec opposed the motion and attached voluminous extrinsic materials to its opposition. App. II: 234-301. Caterpillar moved to strike them. App. III: 302-304. The magistrate-judge heard the motion to dismiss and the motion to strike on August 10, 2005. App. I: 11. On August 12, 2005, Trans-Spec moved with Caterpillar's assent to amend the scheduling order again in various respects, not including the deadline for amendment of the pleadings, and the motion was allowed shortly thereafter. App. I: 11 and App. III: 382-383; *infra* at 2a. On October 7, 2005, Trans-Spec moved again to amend the scheduling order, again without opposition from Caterpillar and again without seeking to re-open the deadline for amendment of the pleadings. App. I: 12 and App. III: 384-385. The judge granted the motion in part on October 26, 2005, admonishing, "The court will grant no further requests for amendments to the scheduling order." *Infra* at 2a-3a; App. I: 12.

On January 31, 2006, the magistrate-judge recommended the motion to dismiss be granted with respect to the breach of express and implied warranty, Magnusson-Moss, and Chapter 93A claims but denied with respect to the negligence claim. Petition at 63a-77a.[5] Her recommendation with respect to the breach of express and implied warranty and Chapter 93A claims was based on expiration of the applicable four-year statutes of limitation.[6] Petition at 64a to

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[5] References to the opinions below contained in the appendices to Trans-Spec's Petition are in this form.

[6] Trans-Spec misrepresents the record when, at page 8 of its Petition, it says, "The Magistrate Judge failed to recognize that Trans-Spec's Chapter 93A claim included matters other than Caterpillar's breach of warranty, and recommended dismissing

72a. She recommended Caterpillar's motion to strike be allowed insofar as it sought to strike the extrinsic materials Trans-Spec submitted but denied insofar as it sought to strike pages of Trans-Spec's brief where those materials were referenced. References to them, she said, should be disregarded, as she had done. Petition at 74a-76a. Trans-Spec objected to the recommendation, attaching voluminous extrinsic materials to its objection. App. III: 402-479. Caterpillar moved to strike them. App. III: 480-482. On February 23, 2006, the district judge adopted the recommendation insofar as it pertained to Caterpillar's motion to dismiss and ruled the motions to strike were moot because neither he nor the magistrate-judge had relied on the extrinsic materials. *Infra* at 3a; App. I: 15 Caterpillar answered the negligence count on February 24, 2006. App. I: 15 (#99) and App. III: 483-491. Trans-Spec moved on March 1, 2006, for leave to amend its second amended complaint and to alter or amend the February 23 order. App. I: 15 (#100) and App. IV: 492-568.

March 17, 2006, was the deadline for dispositive motions. App. I: 12. Caterpillar moved that day for

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it on the same statute of limitations grounds." Trans-Spec affirmatively stated in its opposition to Caterpillar's motion to dismiss, "The accrual date of a Chapter 93A claim is established by the same principles that govern the determination of the underlying actions. Therefore, the Chapter 93A claim accrued at the same time as the breach of warranty claims. *Hanson Housing Authority v. Dryvit System, Inc.*, 29 Mass. App. Ct. 440, 448 (1990)." App. II: 239 n. 3. Nowhere in its opposition did Trans-Spec suggest, contrary to that explicit statement or the language of the second amended complaint, that its claim under Chapter 93A was based on anything other than the alleged breaches of UCC warranties. *See* App. II: 234-247. Trans-Spec therefore waived any argument to that effect.

summary judgment on the remaining negligence claim. App. I: 15 (#102) and App. IV: 576-580. Its summary judgment motion and Trans-Spec's motion to amend its complaint again and to alter or amend the dismissal order were heard together on May 31, 2006. App. I: 18. On June 9, 2006, the magistrate-judge denied the motions to amend and to alter or amend the dismissal order but deferred ruling on the summary judgment motion. Petition 51a-56a; App. I: 20 and VI: 910-914. Trans-Spec moved under Fed. R. Civ. P. 72(a) for reconsideration of her order denying its motion. App. I: 20 (#136). On December 1, 2006, the magistrate-judge recommended allowance of Caterpillar's motion for summary judgment. Petition at 33a-49a. Trans-Spec objected. App. I: 21 (#141). On January 2, 2007, the judge affirmed the order denying Trans-Spec's motion to amend its complaint again and to alter or amend the dismissal order. *Infra* at 3a; App. I: 21. On February 13, 2007, he granted summary judgment for the reasons stated in the magistrate-judge's report and recommendation. App. I: 22; Petition at 31a.

ARGUMENT

I. **Federal law, including the law from this Court and from the several circuits, is clear, unanimous, and well-settled that a complaint is appropriately dismissed under Fed. R. Civ. P. 12(b)(6) when the averments of the complaint, accepted as true, affirmatively show the claim is barred by the applicable statute of limitations. That is what occurred here. Trans-Spec waived any argument that the district court abused its discretion in refusing to consider materials extrinsic to the second amended complaint in opposition to the motion to dismiss and, in any event, there was no abuse of discretion. Trans-Spec's assertion that it could not anticipate the statute of limitations issue is based on misrepresentation of the record, the statute of limitations having been raised as an affirmative defense to the first amended complaint months before Trans-Spec filed the second amended complaint which was dismissed.**

Before turning to the law pertinent to Trans-Spec's Question I, Caterpillar is constrained to correct an inaccuracy in Trans-Spec's account of proceedings below. Trans-Spec repeatedly says, Petition at 11-13, that it did not and could not "anticipate" Caterpillar's affirmative defense based on the statutes of limitation; it suggests, Petition at 11, that Caterpillar first raised the statutes of limitation in its motion to dismiss; and it fails to mention that the pleading that was dismissed was its *second* amended complaint, not its original complaint. The truth, unmentioned by Trans-Spec in its Petition, is that Caterpillar explicitly raised the sta-

tute of limitation defense in its answer to the *first* amended complaint filed on September 20, 2004, App. I: 5 (#15) and 125, more than six months before Trans-Spec sought and obtained leave to file its *second* amended complaint. App. I: 7 (#36). Trans-Spec knew of the statute of limitation defense when it drafted and filed its second amended complaint and had ample opportunity and incentive to correct the deficiencies in it that were material to the timeliness issue. There was no "failure to anticipate" the statute of limitation problem; there was just a failure to cure it.

Caterpillar will now turn to the pertinent law, as to which there is no dissension among the federal courts and which makes clear that the courts below in this action got it right. There is absolutely nothing wrong in dismissing a complaint under Rule 12(b)(6) on statute of limitations grounds if the averments of the complaint, accepted as true, show it is time-barred.

This Court said in *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 920-921 (2007):

> A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief. If the allegations, for example, show that relief is barred by the applicable statute of limitations, the complaint is subject to dismissal for failure to state a claim; that does not make the statute of limitations any less an affirmative defense, see Fed. R. Civ. Proc. 8(c). Whether a particular ground for opposing a claim may be the basis for dismissal for failure to state a claim depends on whether the

> allegations in the complaint suffice to establish that ground, not on the nature of the ground in the abstract.

The courts of appeals have long recognized the same rule. *See, e.g., LaChapelle v. Berkshire Life Ins. Co.*, 142 F.3d 507, 509 (1st Cir. 1998); *Bethel v. Jendoco Const. Corp.*, 570 F.2d 1168, 1174 (3rd Cir. 1978); *Herron v. Herron*, 255 F.2d 589, 593 (5th Cir. 1958); *Hoover v. Langston Equipment Assocs., Inc.*, 958 F.2d 742, 745 (6th Cir. 1992); *Kinchloe v. Farmer*, 214 F.2d 604, 605 (7th Cir. 1954), *cert. denied*, 348 U.S. 920 (1955); *Gossard v. Gossard*, 149 F.2d 111, 113 (10th Cir. 1945). Indeed, the cases cited by Trans-Spec itself recognize and apply it. Judge Posner said in *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), after observing that a plaintiff is not ordinarily required to negate in his complaint a statute of limitations defense: "Of course if he pleads facts that show his suit is time-barred or otherwise without merit, he has pleaded himself out of court." 12 F.3d at 718. And later, "A complaint that on its face reveals that the plaintiff's claim is barred by a statute of limitations or repose can be dismissed on a motion to dismiss, in accordance with the principle noted above that a plaintiff can plead himself out of court." *Id.* at 719. *Harris v. City of New York*, 186 F.3d 243 (2nd Cir. 1999), states the same rule, 186 F.3d at 250, and affirmed the district court's Rule 12(b)(6) dismissal on statute of limitations grounds of several of that plaintiff's claims. *Id.* at 248-249.

This would have been a procedurally different case if, for example, Trans-Spec had omitted from its second amended complaint the dates on which the allegedly defective engines were delivered. If deli-

very dates had not appeared on the face of the second amended complaint it would not have been discernible from that pleading when the four-year statutes of limitation began to run and, hence, the claims would not have been dismissible under Rule 12(b)(6). They would in that circumstance have had to await a summary judgment motion or trial. But Trans-Spec *did* include those dates in the second amended complaint; it also appended as an exhibit to the second amended complaint the specific express warranty it claimed had been breached, so that it was also discernible from the face of the pleading that the warranty was not one of future performance and hence that the dates of delivery were indeed, Mass. Gen. Laws c. 106, §2-725, the dates when the four-year statutes began to run.[7] So Trans-Spec, to use Judge Posner's words, pleaded itself out of court. To use the language of an earlier Seventh Circuit decision, "Plaintiff by the allegations of his complaint erected the limitation bar and it was his duty in order to extricate himself therefrom to plead any exceptions upon which he relied." *Kinchloe*, 214 F.2d at 605. Or, as the court of appeals for the Sixth Circuit put it, "[I]t is not true, when the face of the complaint affirmatively indicates that the time limit for bringing the claim has passed, that plaintiff may escape the statute by saying nothing." *Hoover*, 958 F.2d at 745. *See also Gossard*, 149 F.2d at 113 ("No facts are alleged excusing or explaining the long de-

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[7] Mass. Gen. Laws c. 106, §2-725, specifically excludes any "discovery rule" when the warranty is not one of the future performance of the goods. Typically, actions governed by a statute of limitations that, unlike §2-725, incorporates a "discovery rule" are less susceptible to dismissal under Rule 12(b)(6) or, for that matter, on summary judgment because they often present the question of when the plaintiff "reasonably should have known" of facts giving rise to his claim.

lay.") Having pleaded specific facts that showed its claim was time-barred, Trans-Spec was not entitled to resist dismissal on the ground that it was *possible to imagine* circumstances under which the facially time-barred claim might be viable. A court deciding a Rule 12(b)(6) motion is not required to, and indeed may not properly, "assume that [the plaintiff] can prove facts that it has not alleged." *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526 (1983). If the possibility of *imagining* facts that might save a facially-dismissible claim were enough, Rule 12(b)(6) would effectively be a nullity; if the facts are there, they have to be *alleged*.

Trans-Spec next claims, Petition at 14, that it was unfairly surprised by the magistrate-judge's characterization of the warranty it appended to its second amended complaint as a "repair or replace" warranty rather than an "express warranty" and consequently had no opportunity to address that characterization. A "repair or replace" warranty, however, *is* an express warranty when, as here, it is explicitly set forth in a document rather than implied by law. The express warranty Trans-Spec attached as Exhibit C to its second amended complaint and identified as the one allegedly breached by Caterpillar was, on its face, that type of express warranty if it was (as averred by Trans-Spec and accepted by Caterpillar and the magistrate-judge) a warranty at all.[8] All the

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[8] The court of appeals recognized that Exhibit C to the second amended complaint might well have been more accurately characterized as a service contract than an express warranty subject to the Uniform Commercial Code; but because Trans-Spec characterized it as an express UCC warranty in its second amended complaint and did not argue in the district court or on appeal that it was a service contract, any such argument was deemed waived. Petition at 18a-19a. Trans-Spec has now favored this Court with an ostensible explanation for

magistrate-judge did was read Trans-Spec's pleading, including Exhibit C, and correctly apply state law to it. If Trans-Spec, unlike Caterpillar and the magistrate-judge, really failed to recognize Exhibit C for what it was, it can only have been because Trans-Spec did not read its own exhibit, or because it did not read the relevant statutory and decisional law, or both. Nothing Caterpillar or the magistrate-judge said or did had any tendency to mislead Trans-Spec and any surprise that may have resulted from Trans-Spec's neglect to read its own filings or to consult the applicable law is not the kind of surprise that warrants judicial relief.

Finally, Trans-Spec complains bitterly of the magistrate-judge's, the district court judge's, and the court of appeals' refusals to consider the voluminous extrinsic materials it tried to use in opposition to the motion to dismiss. Trans-Spec has in this regard again failed to give a materially accurate account of proceedings below. Trans-Spec neglects to mention that the court of appeals found Trans-Spec had waived this issue on appeal because it failed to raise it in its principal appellate brief and "misrepresent[ed] the state of the record" with respect to it. Petition at 10a-11a and 20a-21a. Trans-Spec has not suggested there was any error in that finding of waiver and there was none. An appellant's failure to raise an issue in its principal brief, even if merely careless, is in and of itself adequate grounds for holding the issue waived. *E.g.*, *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509, 513 (D.C. Cir.), *cert.*

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why it did not aver or argue that Exhibit C was a service contract. Petition at 25 n.8. True or not, as no such explanation or argument was provided either in the district court or in the court of appeals, and is therefore not part of the record, it is not properly before this Court.

denied, 488 U.S. 890 (1988); *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 3 (1st Cir. 1983); *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 67 n.8 (2nd Cir. 2002); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316 n.2 (3rd Cir.), *cert. denied*, 533 U.S. 953 (2001); *Cavallo v. Star Enterprise*, 100 F.3d 1150, 1152 (4th Cir. 1996), *cert. denied*, 522 U.S. 1044 (1998); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 862 (9th Cir. 1982); *Silverton Snowmobile Club v. U.S. Forest Service*, 433 F.3d 772, 783 (10th Cir. 2006); *KMS Restaurant Corp. v. Wendy's International, Inc.*, 361 F.3d 1321, 1328 n.4 (11th Cir. 2004). Against the procedural background of this case, the court of appeals could well conclude that Trans-Spec's failure to raise the issue in its principal brief was, like other ultimately unsuccessful ploys in which Trans-Spec engaged, not the result of mere carelessness but an intentional effort to obtain unfair procedural advantage. *Compare* Petition at 11a-13a. The district court's discretionary refusal to consider extrinsic materials submitted in opposition to the motion to dismiss is therefore not an issue that is properly before this Court.

In any event, Trans-Spec identifies no mistake of law by either the district court or the court of appeals with respect to the issue and identifies no inconsistency between what the court of appeals did in this case and what other courts of appeals typically do. Both the district court, Petition at 74a to 75a, and the court of appeals, Petition at 10a and 12a, understood that the district court had discretion to consider extrinsic materials if it chose to do so. Understanding that, the district court exercised its discretion *not* to accept the proffered 53 pages of heterogeneous material, much of it of unclear admissibility or relevance and some of it consisting of items that could reasonably have been found to

have been withheld by Trans-Spec until then for perceived self-serving purposes rather than for any objectively good reason. There was no abuse of discretion in that decision.

II. **Federal law is clear, unanimous, and well-settled that, after the deadline for amendments to the pleadings established by a Fed. R. Civ. P. 16(b) scheduling order has expired, a plaintiff wishing to amend its complaint must first show good cause for revising the scheduling order, including a showing that the proposed amendment could not with reasonable diligence have been made before the deadline was reached. The cases Trans-Spec cites for the contrary position were either decided before the governing language of Rule 16(b) was enacted in 1983 or did not involve cases in which the Rule 16(b) deadline had expired. There was no abuse of discretion in denying Trans-Spec's late motion to amend because Trans-Spec showed no good cause for its untimeliness.**

The courts of appeals for all except the Tenth and District of Columbia Circuits have addressed the subject of what standard must be met by a party seeking to amend its pleading after the Rule 16(b) deadline for amendments has passed. Every one of them has held, as the courts below did in this action, that once the Rule 16(b) deadline for amendments has passed a party may not amend its pleading without first establishing good cause for relief from the Rule 16(b) order, and that good cause for purposes of that rule means a showing that the proposed amendment could not with reasonable diligence have been made before the deadline expired. *See, e.g.*,

O'Connell v. Hyatt Hotels, 357 F.3d 152, 154-155 (1st Cir. 2004); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 340 (2nd Cir. 2000); *Eastern Minerals & Chems. Co. v. Mahan*, 225 F.3d 330, 340 (3rd Cir. 2000); *Montgomery v. Anne Arundel County, Maryland*, 182 Fed. Appx. 156, 162, 2006 WL 1194308 at *5 (4th Cir. 2006) (unpublished); *Vercon Const. Inc. v. Highland Mortg. Co.*, 187 Fed. Appx. 264, 265, 2006 WL 1747115 at *1 (4th Cir. 2006) (unpublished); *S&W Enters. v. South Trust Bank of Ala.*, 315 F.3d 533, 536 (5th Cir. 2003); *Leary v. Daeschner*, 349 F.3d 888, 906 (6th Cir. 2003); *Trustmark Ins. Co. v. General & Cologne Life Re of America*, 424 F.3d 542, 553 (7th Cir. 2005); *Sherman v. Winco Fireworks, Inc.*, 532 F.3d 709, 715-717 (8th Cir. 2008); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 608-609 (9th Cir. 1992); *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1231-1232 (11th Cir. 2008); *Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998). The court of appeals for the Tenth Circuit has adopted the same rule where late amendment to add counterclaims is concerned, *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1518-1519 (10th Cir. 1990), but has not had occasion to address the issue in the context of proposed amendments to the complaint. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205 n.4 (10th Cir. 2006). *But see Miller v. Bd. of Educ. of Albuquerque Public Schools*, 455 F. Supp. 2d 1286, 1304 (D. N.M. 2006) (holding that the Rule 16(b) good cause standard must be met in the context of late amendments to the complaint); *Rowen v. New Mexico*, 210 F.R.D. 250, 252-253 (D. N.M. 2002) (same)[9].

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[9] Caterpillar's counsel has found no authority on the subject either at the court of appeals or the district court level in the District of Columbia.

So it may fairly be said that the court of appeals decision in this action is not "in conflict with the decision of another United States court of appeals on the same important matter ... or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). It was correct to hold that Trans-Spec, if it wished to amend its complaint for a third time after expiration of the scheduling order deadline for doing so, was first required to demonstrate to the district court that it could not through reasonable diligence have offered the same amendment before that deadline expired.

So far as the hypothetically narrower question of what standard governs when a plaintiff who has failed to meet the Rule 16(b) scheduling order deadline for amendments to the pleadings also waits until after its complaint has been dismissed to seek the untimely amendment, there is likewise unanimity among the courts that have addressed it: the standard is the same Rule 16(b) "good cause" standard. *See, e.g., Kassner v. 2nd Avenue Delicatessen Inc.*, 496 F.3d 229, 244 (2nd Cir. 2007); *Love v. Ford Motor Co.*, 212 Fed. Appx. 292, 295, 2006 WL 3826991 at *2 (5th Cir. 2006) (unpublished); *Shane v. Bunzl Distribution USA, Inc.*, 275 Fed. Appx. 535, 536-537, 2008 WL 1896589 at *1-*2 (6th Cir. 2008) (unpublished); *Inge v. Rock Financial Corp.*, 281 F.3d 613, 625 (6th Cir. 2002); *In re Milk Products Antitrust Lit.*, 195 F.3d 430, 437-438 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000); *Buel v. City and County of San Francisco*, 166 Fed. Appx. 901, 902-903, 2006 WL 26195 at *1 (9th Cir. 2006) (unpublished); *Baylor Univ. Medical Center v. Epoch Group, L.C.*, 2005 WL 2124126 at *7-*9 (N.D. Tex. 2005); *Dorsey v.*

Northern Life Ins. Co., 2005 WL 2036738 at *21 (E.D. La. 2005); *Tufaro v. Board of Comm'rs. for Orleans Levee Dist.*, 2003 WL 22290290 at *2 (E.D. La. 2003); *Gwyn v. Loon Mountain Corp.*, 2002 WL 1012929 at *8 (D. N.H. 2002), *aff'd.*, 350 F.3d 212 (1st Cir. 2003). Again, the decisions below in this action were consistent with, not in conflict with, the decisions on the same subject by other federal courts and consistent with the ordinary course of proceedings under the rules of civil procedure. Supreme Court Rule 10(a). They were also consistent with common sense and with the general purpose of the rules of civil procedure, *see* Fed. R. Civ. P. 1, to encourage reasonably efficient and expeditious handling of cases. If the law for some reason provided that a motion to amend brought *after* dismissal of a complaint is subject to a materially more relaxed standard than one brought *before* dismissal, dilatory plaintiffs who miss the scheduling order deadline would have an incentive to delay their motions still further, counting on an eventual order of dismissal to ease the path to a late amendment. The rules of civil procedure do not countenance any such absurdity.

In an effort to fabricate a difference of opinion among federal decisions with respect to the standard applicable to late motions to amend, Trans-Spec cites in its Petition, as it did below, decisions from this Court and others that were rendered before the 1983 amendments to Rule 16 that inserted the present requirements that the district court convene a scheduling conference, issue a scheduling order with a deadline for amendments to the pleadings, and providing that the scheduling order may only be revised upon a showing of good cause. But those decisions are simply irrelevant. The 1983 amendments to Rule 16(b) (and to other rules as well) changed the procedural

law governing civil actions in the federal courts. Trans-Spec cites no authority, because there is none, to support the proposition that the provisions inserted into Rule 16(b) in 1983 are invalid or do not mean what they say. *Foman v. Davis*, 371 U.S. 178 (1962), undoubtedly remains good law so far as the correct interpretation of Rule 15(a)(2) is concerned and is appropriate authority to cite when a motion to amend is brought consistent with the scheduling order deadline for amendments; but *Foman* was decided about twenty-one years before the now-controlling provisions of Rule 16(b) were enacted, and says nothing about the interaction between Rule 15 and those provisions. Neither *Foman* nor any of the other pre-1983 cases Trans-Spec cites is evidence of disagreement on the subject of the standards governing *post-1983* motions to amend, and none of those cases has anything at all to say regarding the correctness or incorrectness of the decisions below in this post-1983 action.

As it did below, Trans-Spec has also cited some post-1983 decisions in which courts applied the liberal Rule 15(a) standard in granting post-dismissal motions to amend. *See Buckey v. County of Los Angeles,* 968 F.2d 791 (9th Cir. 1992); *Cortec Industries, Inc. v. Sum Holding, L.P.*, 949 F.2d 42 (2nd Cir. 1992); *Oliver Schools v. Foley*, 930 F.2d 248 (2nd Cir. 1991); *Williams v. Astra USA, Inc.*, 68 F.Supp.2d 29 (D. Mass. 1999). Just as it did below, however, Trans-Spec fails to mention that it does not appear from any of those opinions that a Rule 16(b) deadline for motions to amend had expired or, indeed, even that such a deadline had been established. They are therefore irrelevant. No issue is presented by this Petition regarding the proper standard for granting a motion to amend brought within the time permitted for such motions by the

Rule 16(b) scheduling order; the "issue" – really, a non-issue in light of the plain language of the rule itself and the unanimous authority at the court of appeals level – is what standard to apply when the motion is brought too late.

Trans-Spec also argues the district court erred in finding it had not shown good cause for relief from the deadline for amendments to the pleadings. *But see* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings.") Its first argument on this subject, Petition at 21, is implicitly predicated on the same misrepresentation of the record identified *supra* at 9-10. Trans-Spec says:

> How could Trans-Spec have filed a Motion to Amend to cure purported deficiencies raised in Caterpillar's Motion to Dismiss *before* Caterpillar served the Motion to Dismiss? If this is not "good cause," what is?

But the deficiencies in the second amended complaint were not first raised by the motion to dismiss; they were raised by the statute of limitation defense inserted in Caterpillar's answer to the first amended complaint in September, 2004, six months before the deadline for amendments to the pleadings. The answer to Trans-Spec's rhetorical questions is that Trans-Spec's lawyers could have read Caterpillar's affirmative defenses when they received them, reread their complaint in light of the statute of limitations defense contained among those affirmative defenses, given a little thought to the law that governed Trans-Spec's claim, and then – sometime during the six months that intervened between Caterpillar's answer and the scheduling order deadline

for amendments to the pleadings - requested leave to amend to insert factual averments to cure the facial inadequacies of their complaint if they could do so conformably with the provisions of Fed. R. Civ. P. 11.

Trans-Spec's next argument, Petition at 22, seems to be that there was no "undue delay" in its untimely motion to amend because it had no reason to think an amendment was needed until the magistrate-judge recommended allowance of the motion to dismiss. This is just a repackaging Trans-Spec's meritless argument that amendment must routinely be allowed whenever a complaint is dismissed, regardless of the Rule 16(b) deadline and regardless of when the plaintiff knew or should have known the supposed facts which it wishes to insert into its complaint by way of the amendment. That is not the law. A plaintiff is not free to select the particular litigation strategy its lawyers believe best suits its tactical interests but, when their judgment is proved wrong, simply switch to Plan B regardless of what the subsisting schedule for the case says. Trans-Spec had all the information on which its untimely amendment would have been based long before the deadline for amendments to the pleadings; and Trans-Spec certainly knew or should have known what Massachusetts law had to say about the statute of limitations. Whatever Trans-Spec's reasons were for proceeding the way it did, as to which *see* Petition at 12a n.3, they did not include justifiable ignorance of matters that it later decided it wanted to insert into its complaint. [10]

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[10] Trans-Spec also complains that it was subjected to a "double standard" because, after it filed its second amended complaint, Caterpillar's prompt motion to dismiss it pursuant to Rule 12(b)(6) was entertained by the district court even though the scheduling order deadline for such motions had ex-

Trans-Spec seems to labor under a fundamental misunderstanding of what Rule 15 is intended to accomplish. The purpose of Rule 15 is not to give litigants the opportunity to experiment with strategic approaches to the litigation until they find the one that works out best for them. It is not intended to permit litigants to aver one set of facts and then, when those facts turn out not to be so good for them, to aver a new set, and so on until they eventually find, no matter how long it takes, a set of averments that works for them. Rule 15 is intended to prevent injustice, not to facilitate disingenuous pleading and not to excuse litigants or their lawyers from paying attention to the evidence they have or the applicable law.

CONCLUSION

Trans-Spec's Petition identifies no novel issue of federal law or any issue of federal law as to which there is a difference of opinion among the federal courts. It identifies no error of procedural law in the district court or the court of appeals and there was none. Trans-Spec is unhappy with some discretionary decisions the district court made, unhappy with the consequences under state law of the alleged facts that were properly before the district court, and unhappy with the result of the strategy it chose to pur-

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pired. Caterpillar could not move to dismiss the second amended complaint (itself untimely under the scheduling order) until the second amended complaint had been filed. The district court certainly could, and obviously did, properly find that being served with an amended complaint after the deadlines *for amending the complaint* and for Rule 12(b)(6) motions had passed constituted good cause for entertaining a motion to dismiss the belatedly-amended complaint filed promptly after that pleading was filed.

sue in the district court. Unhappiness of that kind is no ground for this Court to grant certiorari review of a run-of-the-mill state law warranty and negligence case.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 2004-CV-11836-RCL

TRANS-SPEC TRUCK SERVICE, INC.
d/b/a TRUCK SERVICE,
Plaintiff

v.

CATERPILLAR INC.,
Defendant

CIVIL DOCKET FOR CASE #: 1:04-cv-11836-RCL

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10/27/2004 Electronic Clerk's Notes for proceedings held before Judge Reginald C. Lindsay: Scheduling Conference held on 10/27/04. Fact discovery due by 6/29/05. Plaintiff's expert disclosure due 7/27/05. Defendant's expert disclosure due 8/24/05. Rule 12, 15, 19 and 20 Motions due 3/23/05. Discovery due by 10.26.2005. Motions due by 11/22/05. Court allows Plaintiff to take 12 depositions. (Court reporter none present.) (Stanhope, Don.) (Entered: 10/28/2004).

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06/01/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting 48 Mo-

tion to Amend Scheduling Order (Hourihan, Lisa) (Entered: 06/01/2005).

06/01/2005 Set/Reset Scheduling Order Deadlines: Fact discovery due by 8/29/05. Plaintiff to disclose expert by 9/27/05. Defendant to disclose expert by 10/24/05. Discovery due by 12/23/05. Motions due by 1/27/2006. (Hourihan, Lisa) (Entered: 06/01/2005)

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08/16/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting 68 Motion to Amend Scheduling Order (Hourihan, Lisa) (Entered: 08/16/2005)

08/16/2005 Set/Reset Scheduling Order Deadlines: Fact discovery due by 9/29/05. Plaintiff to disclose expert by 10/27/05. Defendant to disclose expert by 11/23/05. Discovery due by 1/23/2006. Motions due by 2/27/2006. (Hourihan, Lisa) (Entered: 08/16/2005)

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10/26/2005 Judge Reginald C. Lindsay: Electronic ORDER entered granting in part and denying in part 76 Assented to MOTION to Amend Scheduling Order. The motion is granted to the extent that it seeks a change in the scheduling order. However, the scheduling order will be changed only to this extent: the deadline for expert reports from the plaintiff shall be December 7, 2005; the deadline for expert reports from the defendant shall be

January 13, 2005; expert discovery shall be concluded by February 17, 2006; dispositive motions shall be filed not later than March 17, 2006. The modification granted today is the third of such modifications in this case. The court will grant no further requests for amendments to the scheduling order. (Lindsay, Reginald) (Entered: 10/26/05)

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02/23/2006 Judge Reginald C. Lindsay: Electronic ORDER entered. ORDER ADOPTING REPORT AND RECOMMENDATIONS for 56 MOTION of Caterpillar Inc. to Strike Portions of Plaintiff's Opposition to Motion to Dismiss and to Strike Certain Attachments and 53 MOTION of Caterpillar Inc. to Dismiss Second Amended Complaint Action on motion: The motion to dismiss counts I and II of the second amended complaint is granted. Because neither the magistrate judge nor I have relied on the documents attached to the plaintiff's opposition, the motion to strike those documents and the portion of the opposition referring to them is moot. (Lindsay, Reginald) (Entered: 02/23/2006)

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01/02/2007 Judge Reginald C. Lindsay: Electronic ORDER entered overruling plaintiff's objection (docket #136) to memorandum and order of magistrate judge (docket #135) and affirming order of magistrate judge in all respects. (Lindsay, Reginald) (Entered 01/02/2007)

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(3)

Supreme Court, U.S.
FILED
OCT 3 - 2008
OFFICE OF THE CLERK

No. 08-283

IN THE
Supreme Court of the United States

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE,
Petitioner,

v.

CATERPILLAR INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF TO CATERPILLAR INC.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Petitioner

Dated: September 3, 2008

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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II. The Appeals Court erred to create a new standard in the First Circuit, and departed from the accepted and usual course of judicial proceedings, by: (a) not allowing Trans-Spec leave to amend its complaint where it quickly sought to do so in response to dismissal of its complaint; (b) disregarding that Trans-Spec met the Rule 16(b) standard under those circumstances, *see Inge v. Rock Financial Corporation*, 281 F.3d 613 (6th Cir. 2002); and, (c) ignoring that Caterpillar's own late filing of its Motion to Dismiss made it *impossible* for Trans-Spec to move for leave to amend to cure any purported deficiencies raised by that Motion prior to the deadline to do so. 7

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TABLE OF AUTHORITIES

CASE:

Inge v. Rock Financial Corporation,
281 F.3d 613 (6th Cir. 2002) 7, 9, 10

ARGUMENT

Pursuant to Rule 15.6, Trans-Spec Truck Service, Inc. ("Trans-Spec") hereby submits the following reply brief addressed to new points raised in the brief in opposition filed by Caterpillar Inc. ("Caterpillar").[1]

I. The Appeals Court erred to create a new pleading and dismissal standard in the First Circuit by eliminating Trans-Spec's right to rebut Caterpillar's affirmative defenses and by affirming dismissal of Trans-Spec's viable claims.

Caterpillar notes that it put Trans-Spec on notice of its affirmative defense based on the statute of limitations by raising it in boilerplate fashion in its answer. Opposition at 10, 21. That does not alter the fact that, under the lower courts' various rulings, Trans-Spec never had an opportunity to rebut that affirmative defense, as was its right. *See* Petition at 12-13.

Moreover, as Trans-Spec noted on page 7 of its Petition, Caterpillar's affirmative defense arguably applied to Trans-Spec's implied warranty claims, in

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[1] Caterpillar relies on invective throughout its brief in an attempt to distract this Court from the merits of Trans-Spec's petition, but fails to proffer sound reasoning to support many of its statements. Caterpillar also forgets that apples do not become oranges simply by argument. Trans-Spec briefly addresses Caterpillar's more troubled or simply erroneous arguments in this reply, but ignores Caterpillar's admittedly amusing attacks, including statements belittling the reading abilities of Trans-Spec's counsel.

the event that the Court disfavored Trans-Spec's tolling and waiver arguments in rebuttal. Trans-Spec could not anticipate, however, that the Magistrate Judge would apply the affirmative defense inappropriately, in the manner that she did, to a warranty which Caterpillar repeatedly conceded was an express warranty of future performance.

Prior to moving for dismissal, Caterpillar conceded in an answer to interrogatory, "Caterpillar's express warranties provided, in part, that if a defect in material or workmanship is found during the extended (5-year or 500,000 miles) warranty period applicable to certain components and assemblies specified in the warranties, Caterpillar will . . . correct the defect." RA152.[2] That is the very definition of a warranty of future performance. Caterpillar's Manager of Technical Support further conceded by affidavit, again served prior to Caterpillar's motion to dismiss, that the "extended warranty on each engine ends either on December 8, 2004 (for the engines delivered on December 8, 1999) or January 14, 2005 (for the engines delivered on January 15, 2000)." RA112E. Caterpillar's Motion to Dismiss conceded that the Five Year Warranty comprised an "express warranty", RA225, 233, but never identified it as a repair or replace warranty. Caterpillar began

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[2] Trans-Spec provides cites to the Record Appendix in the Appeals Court matter as RA[page number]. Trans-Spec did not provide Record Appendix cites in its Petition because this Court does not receive a copy of the Record Appendix in determining whether to grant a Petition for Writ of Certiorari. Should the Court wish, Trans-Spec is more than happy to provide Record Appendix cites for any and all propositions made in the Petition.

interpreting the Five Year Warranty as a repair or replace warranty only after the Magistrate Judge identified it as such on her own. Caterpillar claims that Trans-Spec "did not read its own exhibit," Opposition at 14, yet it interpreted that exhibit, a warranty which it drafted, exactly as had Trans-Spec. *See* RA112E, 152.

Caterpillar cites a string of inapplicable cases on pages 10-11 of its Opposition. Whether a court should dismiss a complaint under Rule 12(b)(6) on statute of limitations grounds if the averments of the complaint, accepted as true, show it is time-barred is not at issue here. The appropriateness of dismissal in such a case is well-settled. *See* Petition at 10.

On the face of Trans-Spec's complaint, however, time-bar was *not* apparent. Trans-Spec referred to multiple express warranties.[3] Trans-Spec attached one of these warranties to its complaint. Caterpillar

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[3] Among other things, Trans-Spec alleged in its Complaint at RA062:

> 38. Caterpillar made express warranties . . . that the engines, and specifically their crankshaft seals, flywheel housings, and cylinder block casting, were to be covered for repair or replacement. Caterpillar drafted these warranties. All of these warranties were relied upon by Plaintiff.
>
> 39. Said warranties were breached by Caterpillar and the engines were not merchantable, not fit for the ordinary purposes for which they are used, not fit for the particular purposes for which they are used at the time of the accident, and not repaired when they broke.

identified and treated this warranty as one of future performance (at least, it did so until the Magistrate Judge's ruling). Another warranty Caterpillar gave Trans-Spec, the language and applicability of which has never been in dispute, stated that, "Caterpillar . . . warrants new . . . C-12 . . . engines sold by it for use in powering on-highway vehicles . . . to be free from defects in material and workmanship" for a "*standard warranty period*"" of "24 months after the date of delivery", before it described the Extended Warranty, under which "parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first[.]"[4] RA428, 430. All of this language comprises, by definition, warranties of future performance. Trans-Spec also referred in its complaint to several implied warranties, admittedly outside of the statute of limitations except for Trans-Spec's rebuttal argument. Trans-Spec had the right to rebut Caterpillar's affirmative defense as to all of its warranty claims. *See* Petition at 10-17. Trans-Spec did so by proffering waiver and tolling arguments.

Caterpillar errs to say Trans-Spec has not addressed the Appeals Court's opinion that Trans-Spec waived argument as to the Magistrate Judge's, District Court Judge's, and Appeals Court's refusal

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[4] Inexplicably, the Appeals Court, at A. 16a n.6, claims that Trans-Spec did not point out to it this language, *but see* Trans-Spec Brief at 6 (in bold in the original: "**The Two Year Warranty defines the Five Year Warranty as an 'Extended Warranty' under which 'parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first[.]'**"); cross-reference cited again at 16 and 17, and again in Trans-Spec's Reply Brief at 12 and 20 (quoting the relevant language).

to consider extrinsic materials, *see* Opposition at 14. Trans-Spec addressed this point at footnote 4 on pages 11-12 of its Petition.

Caterpillar likewise misrepresents at page 15 of its Opposition that Trans-Spec identifies no mistake of law with respect to the refusal by the District Court to examine extrinsic materials submitted in opposition to the motion to dismiss. *Compare* Petition at 10-17.

Caterpillar criticizes the extrinsic materials submitted by Trans-Spec as of "unclear admissibility or relevance" and "consisting of items that could reasonably have been found to have been withheld by Trans-Spec until then for perceived self-serving purposes rather than for any objectively good reason." Opposition at 15-16. The extrinsic materials submitted by Trans-Spec in its Objection to the Magistrate Judge's report included, but were not limited to, Caterpillar's Five Year Warranty, Caterpillar's Limited Warranty (which stated that "parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first"), Rule 30(b)(6) deposition testimony of Caterpillar taken after the parties filed their initial memoranda of law regarding Caterpillar's Motion to Dismiss, deposition testimony of a Caterpillar agent, and a Caterpillar patent which Caterpillar should have, but did not, produce. RA425-37, 449-54, 477-78. Trans-Spec did not withhold these materials, and Trans-Spec fails to understand how Caterpillar's on point documents and testimony were inadmissible, irrelevant, or not reliable.

Multiple times through its Opposition, Caterpillar states, without further explanation, that Trans-Spec tried to gain an "unfair procedural advantage." Opposition at 15; *see also* 16. Trans-Spec acted appropriately, and is perplexed as to what "unfair procedural advantage" Caterpillar thinks it sought or gained here. Trans-Spec treated the Five Year Warranty exactly as Caterpillar previously had: as a warranty of future performance. Trans-Spec had the right to rebut Caterpillar's affirmative defense and it attempted to do so. When the Magistrate Judge issued her Report and Recommendations, Trans-Spec responded accordingly, and proffered additional materials to reply to her erroneous interpretation. Trans-Spec also immediately sought to amend its complaint so as to cure any purported deficiencies.[5]

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[5] *See also* Caterpillar's accusation that Trans-Spec sought to aver different sets of facts. Opposition at 23. Rebutting an affirmative defense, and relying on defendant's own warranty documents, affidavits, deposition testimony, answers to interrogatories, and statements in motions to do so, or to interpret a warranty document at issue, is far different from being an inconsistent plaintiff casting about in search of a viable set of facts. Trans-Spec's Motion to Amend was replete with cites from Caterpillar's Rule 30(b)(6) deposition, and attached portions of the transcript of Caterpillar's Rule 30(b)(6) deposition along with the Caterpillar-drafted Limited Warranty document. RA511-524, along with the reports of Trans-Spec's two experts, RA525-548. Other allegations pertaining to Trans-Spec's tolling and waiver arguments are supported by deposition testimony, under oath, of Trans-Spec officers and a Caterpillar agent, as well as Trans-Spec's Answers to Interrogatories, all dated before Trans-Spec's Motion to Amend, regarding assurances made and actions taken by Caterpillar. RA260, 313-318, 477-79, 697-698, 1043-1045. On the other hand, Caterpillar flip-flopped on what its warranties mean. Caterpillar even went so far as to say the following language "is not a warranty of future performance."

II. **The Appeals Court erred to create a new standard in the First Circuit, and departed from the accepted and usual course of judicial proceedings, by: (a) not allowing Trans-Spec leave to amend its complaint where it quickly sought to do so in response to dismissal of its complaint; (b) disregarding that Trans-Spec met the Rule 16(b) standard under those circumstances, *see Inge v. Rock Financial Corporation*, 281 F.3d 613 (6th Cir. 2002); and, (c) ignoring that Caterpillar's own late filing of its Motion to Dismiss made it *impossible* for Trans-Spec to move for leave to amend to cure any purported deficiencies raised by that Motion prior to the deadline to do so.**

Caterpillar cites a string of cases at page 17 of its Opposition for the non-disputed, but inapplicable, general proposition that once the Rule 16(b) deadline for amendments to the scheduling order has passed, a party may not move to amend its pleading without first establishing good cause for relief from the Rule 16(b) order. These cases involve garden variety motions to amend, e.g., to add new claims or additional defendants.

Here, Trans-Spec moved for leave to amend its complaint in response to dismissal based on purported deficiencies raised by Caterpillar's Motion

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Caterpillar Appeals Brief. n.4. p. 21: "Caterpillar . . . warrants new . . . C-12 . . . engines sold by it for use in powering on-highway vehicles . . . to be free from defects in material and workmanship" for "24 months[.]" If that language does not comprise a warranty of future performance, what does?

to Dismiss. Caterpillar notes that Caterpillar filed its second amended complaint on May 24, 2005, and concedes that Counts I and II of this amended complaint – the counts dismissed pursuant to the Motion to Dismiss – were "identical" to those in Trans-Spec's earlier complaint. Opposition at 5. Caterpillar fails to proffer any reason, much less a good one, as to why it failed to move timely to dismiss Counts I and II of Trans-Spec's earlier complaint. Counts I and II were the only ones truly at issue in the Motion to Dismiss. Caterpillar vigorously opposed Trans-Spec's motion to amend its complaint to add a third count, negligence, against Caterpillar. The Magistrate Judge disfavored Caterpillar's futility argument and, accordingly, granted Trans-Spec leave to amend.[6] Caterpillar knew that the Court likely would not dismiss a count after granting leave to amend the complaint to add that very same count. The fact remains that absolutely *no good reason* existed as to why Caterpillar did not move to dismiss Counts I and II within the deadline to do so. *That* is the reason why Caterpillar has not proffered an explanation for its

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[6] Trans-Spec is surprised that Caterpillar cites the Magistrate Judge's Order on this point. Caterpillar observes that the Magistrate Judge allowed Trans-Spec to file a motion to amend eight day late. Opposition at 5. As the Magistrate Judge also noted, discovery problems, caused by Caterpillar's withholding of documents, caused the late filing. The Magistrate Judge thus held, "given the on-going discovery dispute and the fact that Trans-Spec filed its motion to amend only eight days late, the Court can not say that Trans-Spec has not been assiduously pursuing its claims." RA0185. Trans-Spec did not want to bring its motion to add a negligence claim until it had obtained sufficient information from Caterpillar to support that claim. Trans-Spec was simply trying to play within the procedural rules.

failure. In short, Caterpillar caught a luck break, and the rule of law should not turn on lucky breaks.

The string of cases Caterpillar cites on pages 18-19 of its Opposition do not address what happened here. These cases fail to discuss, much less set forth a unanimous governing procedure, where a plaintiff seeks post-dismissal leave to amend its complaint when the defendant filed its motion to dismiss on or after the scheduling order deadline for motions to amend and motions to dismiss. Under the Appeals Court opinion in this case, at least in the First Circuit, where a defendant files a motion to dismiss on or after the scheduling order deadline, a plaintiff's right to move to amend to cure purported deficiencies is eliminated as untimely and as insufficient good cause under Rule 16(b). For the sake of procedural clarity and uniform practice among the Circuits, this unsettled matter needs to be resolved by this Court.

Moreover, even some of the cases Caterpillar cites hold that an untimely motion to amend, filed in response to a motion to dismiss, meets the Rule 16(b) standard. For example, in *Inge v. Rock Financial Corporation*, 281 F.3d 613 (6th Cir. 2002), the Appeals Court addressed a situation in which a plaintiff filed late a motion to amend in response to defendant's motion to dismiss. *Id.* at 616. The district court denied the motion to amend as untimely because the plaintiff failed to show good cause under Rule 16(b) for modifying the amendment deadline set in the scheduling order. *Id.* at 617. The Court in *Inge* reversed the district court, ordered that the plaintiff be allowed to file an

amended complaint, found that good cause existed, and added that, "because Plaintiff's request to amend was a prompt effort to remedy pleading deficiencies identified by the district court in the dismissal order—as opposed to an effort to add new claims or parties—we envision no prejudice to Defendant from granting leave to amend." *Id.* at 626. The *Inge* opinion certainly conflicts with the First Circuit's opinion here.

Caterpillar misrepresents Trans-Spec's position to claim that, under Trans-Spec's theory set forth in its Petition, a motion to amend brought after dismissal of a complaint would somehow be subject to a more relaxed standard than a motion to amend brought before dismissal. Opposition at 19. Caterpillar's statement makes no sense, and Trans-Spec said no such thing. The same test – that the proposed amended complaint sufficiently states a valid cause of action – should apply in either case.

Caterpillar also criticizes that Trans-Spec did not earlier move the Court to extend the Rule 16(b) scheduling order deadline for amendment of the pleadings. Opposition at 6. Trans-Spec did not do so because no need arose until the Magistrate Judge issued her report. Trans-Spec did not intend to add any new parties or claims. Also, if necessary for some unforeseen reason, Trans-Spec could have moved at a later date under Rule 15 for an amendment to conform to the evidence.

CONCLUSION

For the above foregoing reasons, Petitioner Trans-Spec Truck Service, Inc. respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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